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THE LAW OF INSURANCE

VOLUME I



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THE
LAW OF INSURANCE

AS APPLIED TO
FIRE, LIFE, ACCIDENT, GUARANTEE
AND OTHER NON-MARITIME RISKS

BY
JOHN WILDER MAY

Fourth Edition

REVISED, ANALYZED, AND GREATLY ENLARGED

BY JOHN M. GOULD

IN TWO VOLUMES

VOL. I

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PREFACE TO THE FOURTH EDITION.

JUDGE MAY'S treatise upon the Law of Insurance has now for so many years been a recognized help to the profession and to the bench, and has been so constantly relied upon, and cited with such approval, as to leave little to be desired with respect to its plan and statement of principles. But the vast interests involved in the different forms of insurance, and the necessity of having its business conducted by sure and intelligent rules, appear to have uniformly conduced towards having the best legal talent engaged in the discussion of new questions thereon before the courts, and thus, from issues carefully raised, the development of doctrine upon this topic has, it seems, been particularly systematic, and upon clear lines of business progress and certainty. This is especially noticeable in the numerous cases decided since the last edition of this treatise in 1891, when the painstaking labors of MR. FRANK PARSONS raised this book to a high rank. His analysis of chapters, improvement of the Index, and the addition of important sections, discussing the problems involved

in the decisions rendered after the author's second edition in 1882, made the work very acceptable up to that time. In the present edition, the difficulties of which have been somewhat increased by the growth of courts and decisions, the labors of the author and of Mr. Parsons have been supplemented by the addition of all the more important decisions down to the date of going to press, special attention being given to the very latest decisions, and many new topics, not before referred to in the Index, being discussed from the advanced standpoint thus afforded. These new topics include standard policies, incontestable clauses, proofs of death and of loss, additions to buildings, adjacent buildings, removal of goods, duty of the insured to read his policy, etc., while such leading heads as general and local agents, conditions, forfeiture, waiver, suicide and insanity, assignments, arbitration, mutual and foreign companies, etc., have been further developed in lengthy notes, the value of which can be best determined by use. About three thousand cases are now added. To make room for these additions, the longer quotations from opinions have been transferred from the text to the notes.

JOHN M. GOULD.

Boston, October, 1900.

PREFACE TO THE THIRD EDITION.

THE present edition of this well-known work exhibits a growth corresponding to the vast increase of the business whose legal aspects are treated in these volumes. This edition contains about seventy-five per cent more matter than the last. Every effort has been put forth to make the necessary additions in a manner worthy of the high character of the original structure. The old cases have been revised, and new ones added to a number nearly sufficient to double the Table of Cases. All relevant decisions in the United States, England, Scotland, Ireland, Canada, New Brunswick, and Nova Scotia, have been examined down to as recent a date as was possible before going to press in the spring. In respect to courts of the last resort, in the United States, exhaustiveness has been the aim; but in treating the labors of other courts, decisions that are merely cumulative authority upon undisputed points have been frequently omitted.

The analyses at the chapter heads are entirely new, and, as a condensation of the substance of Insurance Law, will, it is hoped, be found useful.

The new matter in text and notes is enclosed in brackets. Where possible, with due regard to the value of the new material, it has been consigned to the footnotes, but many times a place had to be given it in the text, in order to secure harmony of treatment, and give equal attention to matter of equal novelty and importance.

The old section numbers remain, almost without exception, the same as in the last edition; the new sections being distinguished by an alphabetical termination, for example, 109 A. This edition contains six more chapters than the last.

The Index has been remodelled, greatly increased in size and minuteness, and in some degree rendered analytic in its character.

FRANK PARSONS.

BOSTON, 1891.

NOTICE TO SECOND EDITION.

THIS second edition has been improved by a careful revision of all the cases cited in the first edition; by the addition of about two thousand cases, mostly decided since the publication of that edition, many of them from Canadian and other colonial and foreign reports not heretofore generally accessible; by a considerable enlargement of the Index; by very frequent cross references; and by the elimination of such matter of discussion as has now become of less relative importance since the practical settlement of questions to which it related.

The author will not venture to say that no case has escaped his notice; but he will be surprised if any case deciding any new and important point shall be found to have been overlooked.

The original purpose has been kept steadily in view, — to present within a moderate compass a complete summary of what is to be found of importance in the reports printed in the English language upon the topics under consideration.

The author desires to acknowledge his obligations to his professional brethren for their friendly criticisms, — which he hopes will be continued, — whereby he has been able to correct errors which otherwise might have escaped his notice, and by which he will be materially assisted in his efforts to present them with a safe guide to their investigations.

J. W. M.

Boston, Jan. 1, 1882.

PREFACE TO THE FIRST EDITION.

AN effort has been made in the following pages to give, within the limits of an ordinary volume, such a statement of the law of Insurance as applicable to non-maritime subject-matters, as will meet the requirements of those engaged in the various branches of the business, the student, and the practising lawyer. To extract from the wealth of material furnished by the reports so much as seems to be essential to a correct understanding of the results arrived at; to set it out with the requisite fulness and precision; and to fuse the whole into a form having method, unity, and completeness, — has been found to be a work of much greater difficulty than was foreseen. Nevertheless, by a studied brevity in the statement of the earlier questions which may now be regarded as settled, room has been found to present, with considerable fulness, the discussions to be found in the reports upon many of the more recent questions which may be regarded as still undergoing the process of elaboration; such, for example, as the liability for loss by explosion, how far suicide

is a defence, and the import of the phrase, "travelling by public conveyance." Such a work, however, can never be truly said to be finished. That it has been successfully begun, is more than the author will venture to affirm. Still, he believes that the profession will here find results which, however imperfect, they will welcome as a foretaste of something better, bearing, he trusts, such evidence of an earnest purpose to subserve their interests as they have a right to expect from

THE AUTHOR.

Boston, December, 1873.

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INSURANCE:

FIRE, LIFE, ACCIDENT, ETC.

CHAPTER I.

OF THE NATURE OF THE CONTRACT.

REINSURANCE. — DOUBLE INSURANCE.

ANALYSIS.

1. THE CONTRACT GENERALLY.

- § 1. *Definition.* A promise upon consideration to pay a contingent loss on the implied condition that the consideration shall be returned if the risk never attaches (see § 4).
According to the subject-matter and the peril insured against it is called fire, life, accident, marine, &c., insurance.
- §§ 2-3. It is essentially a contract for indemnity, not profit (see also §§ 11, 7, 8).
Its object is to relieve individuals from the crushing weight of losses that come upon them without their own fault by distributing the burden over the community. It is governed by the same general principles as other contracts, but has special characteristics, and must be interpreted in the light of its purposes and history.
- § 4. If the subject-matter is not put at risk, the insurer cannot, in the absence of fraud, retain the premium. Italian writers *contra*.
- § 5. It is an aleatory contract, an exchange of risks.
- § 6. It is personal and does not run with the title to the subject-matter, except by express provision; see § 72.
- §§ 7-8. An effort has been made to show that life-insurance does not involve the principle of indemnity, but in truth the purpose always is indemnity for the loss of a valuable interest. It is this which distinguishes insurance from a mere wager (see §§ 33, 74). *What* the interest shall be, provided it is valuable, and whether the amount of its value shall be estimated after loss, or beforehand, as in life policies, and in valued policies fire and marine, are merely incidental questions.

2. REINSURANCE.

- §§ 9-12 C. Reinsurance is the contract one insurer makes with another to protect the first from a risk he has already assumed (see also § 98). The contract between reinsurer and reinsured is in general subject to like rights and liabilities as that between reinsured and the person originally insured. It is a contract for indemnity, no more. The insolvency of the reinsured does not affect the liability of the reinsurer (§ 11 *et seq.*).
- The extent of the reinsurer's liability is determined, subject of course to the express terms of the agreement, by the amount the insurer *has paid*, if he has settled with the assured, and by what the insurer is *liable* to pay the assured where a final settlement has not been reached, and without any reference to the *ability* of the original insurer to pay in full (§ 11 A).
- Settlement with the assured in violation of promise to reinsurer releases the latter (§ 12 A).
- The party first insured acquires no rights against the reinsurer, nor any special claim on the money paid the reinsured unless so agreed (see § 12, note).
- The contract is not within the statute of frauds (§ 12 A).
- Conditions of the original policy do not always affect the reinsurance, but the reinsurer is bound by the insurer's waiver.
- waiver of the insurer or his assent to an assignment (§ 12 B).
- Reinsurance of risks in New York does not include policies issued in New York on property elsewhere (§ 12 C).
- Parol is admissible to show that a policy is one of reinsurance (§ 12 D).
- The beginning of the risk is the same as that of the original one unless otherwise expressed (§ 12 D).
- Usage, costs of suit against reinsured, concealment, representation, notice, and proof of loss, reinsurance of all risks, surplus fund, &c., see Index.
- In Massachusetts the freedom of reinsurance is limited. Pub. Stats. 703, 716.

3. DOUBLE INSURANCE.

- § 13. Double insurance is more than one insurance of the same interest. The insured can recover no more than his loss. Proportional liability of the insurers and contribution among them.

§ 1. **Definition.** — Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss. Such, in its most general terms, is the definition of the contract which is to constitute the subject of the following chapters. It is substantially the definition given long ago by Roccus, and is recommended alike by its brevity and its comprehensiveness, — qualities upon which subsequent writers have scarcely been able to improve.

"*Asscuratio*," says that early writer, "*est contractus quo quis alienae rei periculum in se suscepit, obligando se, sub certo pretio, ad eam compensandam, si illa perierit.*"¹ Neither the times and amounts of payments by the insured, nor the modes of estimating or securing the payment of the sum to be paid by the insurer, affect the question whether the agreement between them is a contract of insurance. All that is requisite to constitute such a contract is the payment of consideration by the one, and the promise of the other to pay the amount of loss agreed upon in the contract, or to be determined upon investigation, to the person entitled to claim it, upon the happening of the contingency contemplated in the contract.² (a) .

¹ De Asscur. not. 1. See also Bynkershoeck's *Laws of War*, Du Ponceau's ed. 164. "Insurance is a contract by which the one party, in consideration of a price paid to him, adequate to the risk, becomes security to the other, that he shall not suffer loss, prejudice, or damage by the happening of the perils specified to certain things which may be exposed to them." Per Mr. Justice Lawrence in *Lucena v. Craufurd*, 2 Bos. & Pul. New Rep. 269, 300, after citing the definitions of Valin, Roceus, and others.

² *Commonwealth v. Wetherbee*, 105 Mass. 149. See also *post*, §§ 6, 550 a.

(a) The Massachusetts statute of 1897, ch. 66, § 1, defined an insurance contract to be "an agreement by which one party for a consideration promises to pay money or its equivalent or to do some act of value to the assured upon the destruction, loss or injury of something in which the other party has an interest." This statutory definition is probably nothing more than a declaration of the common-law definition of insurance, as given by Mr. Justice Gray, in *Commonwealth v. Wetherbee*, 105 Mass. 160. See *Claffin v. U. S. Credit System Co.*, 165 Mass. 501. On May 11, 1898, the Attorney-General of Massachusetts, in an opinion addressed to the Insurance Commissioner, ruled that the essential element of insurance is that the insured receives indemnity from loss by reason of the happening of events without his control or the control of the insurer; and that, if a physician contracts for his services for a fixed

time for a fixed price, it is not insurance. Attorney-General's Report (1898), p. 28. The guaranteeing of a realty revenue from farming lands is insurance, such a revenue being subject to many contingencies, as winds, hail, frost, drought, ravages of insects, etc. Re Hogan (N. D.), 78 N. W. 1051. So an agreement by which a corporation, in consideration of a sum paid, is to purchase at a fixed price the accounts which during one year a business firm shall have against ascertained insolvent debtors, or judgment creditors against whom execution shall be returned unsatisfied, was a contract of insurance within the Massachusetts act of 1887, ch. 214, which, by limiting insurance to what was authorized by that Act, excluded credit insurance. *Claffin v. U. S. Credit System Co.*, 165 Mass. 501; *Rosenbaum v. U. S. Credit System Co.* (N. J. L.), 44 Atl. 986. And, in general, a contract to indemnify, wholly or par-

§ 2. **Contract of Indemnity.** — It had its origin in the necessities of commerce;¹ it has kept pace with its progress, expanded to meet its rising wants and to cover its ever-widening fields; and, under the guidance of the spirit of modern enterprise tempered by a prudent forecast, it has from time to time, with wonderful facility, adapted itself to the new interests of an advancing civilization. It is applicable to every form of possible loss. Wherever danger is apprehended or protection required, it holds out its fostering hand, and promises INDEMNITY.² This principle underlies the contract, and it can never, without violence to its essence and spirit, be made by the assured a source of profit, its sole purpose being to guaranty against loss or damage.³ "Though based upon self-interest," says De Morgan,⁴ "yet it is the most enlightened and benevolent form which the projects of self-interest ever took. It is, in fact, in a limited sense and a practicable method, the agreement of a community to consider the goods of its individual members as common. It is an agreement that those whose fortune it shall be to have more than average success shall resign the overplus in favor of those who have less. And though it has as

¹ Insurance Co. v. Dunham, 11 Wall. (U. S.) 1.

² [Insurance contracts are fundamentally for indemnity, and will be liberally construed to that end. Insurance Co. v. Hughes, 10 Lea (Tenn.), 461.]

³ Wilson v. Hill, 3 Met. (Mass.) 66; Kulen Kemp v. Vigne, 1 T. R. 304, per Buller, J.; Franklin Fire Ins. Co. v. Hamill, 6 Gill (Md.) 87; *post*, §§ 7, 116. L'assurance, nous l'avons dit, a pour objet de réparer une perte soufferte par l'assuré, jamais de lui procurer un bénéfice. Alauzet, Traité Général des Assurances, 1 par. 108. Il est de l'essence du contrat d'assurance de ne garantir que les pertes souffertes et les dépenses faites; et, sauf conventions contraires, il est de sa nature de les garantir toutes. Ibid., par. 112. On ne peut faire assurer que ce qu'on court risque de perdre; l'assurance ne doit jamais pouvoir donner un bénéfice à l'assuré. Ce principe, que nous avons déjà eu l'occasion d'établir, doit être maintenu avec le plus extrême sévérité. Ibid., par. 146. Assecuratus non querit lucrum, sed agit ne in damno sit. Straccha, de Assecurationibus, pt. 20, No. 4; Pardessus, Cours de Droit Commercial, 1 § 589, 4.

⁴ An Essay on Probabilities, and on their application to Life Contingencies and Insurance Offices. Pref. p. xv.

tially, a merchant against the peril of loss by the insurance of customers, is a valid insurance agreement. Shakman v. U. S. Credit System Co., 92 Wis. 366.

Insurance is a "trade" as between

citizens of the same state, but it is not a transaction of "commerce" as between citizens of different states. State v. Phipps, 50 Kansas, 609

yet been applied only to the reparation of the evils arising from storm, fire, premature death, disease, and old age, yet there is no placing a limit to the extensions which its application might receive, if the public were fully aware of its principles and of the safety with which they may be put in practice." (a)

§ 3. Amongst the early writers the peculiar nature of this contract has been the subject of much discussion. The Italian doctors, in particular, have been fruitful in dissertations better adapted, says Boulay-Paty,¹ to fatigue the mind than to throw light upon the subject. With them insurance is now a *nudum pactum*, and now a *contractus innominatus*;

¹ Cours de Droit Commercial et Maritime, tome ii. p. 3.

(a) The range of insurance has been considerably extended in recent years, including insurance, *e. g.*, against burglary and house-breaking: see *In re George and Goldsmiths and General Burglary Ins. Ass'n*, Lim'd, [1898] 2 Q. B. 136; of credits, and against losses from the insolvency of debtors: see *American Credit Indemnity Co. v. Carrolton F. M. Co.*, 95 Fed. Rep. 111; Same *v. Athens Woolen Mills*, 34 C. C. A. 161, 165, and note; *Smith v. National Credit Ins. Co.*, 65 Minn. 283; *Goodman v. Mercantile Credit Guarantee Co.*, 45 N. Y. S. 508; *Shakman v. U. S. Credit System Co.*, 92 Wis. 366; by benevolent and charitable associations making contracts by certificates in the nature of life insurance: see, *e. g.*, *Golden Star Fraternity v. Martin*, 59 N. J. L. 207; *Brierly v. Equitable Aid Union*, 170 Mass. 218; *Fisher v. Donovan*, 57 Neb. 361; of titles: see *Stensgaard v. St. Paul Real Estate Title Ins. Co.*, 50 Minn. 429; *Northwestern Masonic Aid Ass'n v. Jones*, 154 Penn. St. 99; *Lloyds' policies*, by which suits are to be brought only against the attorney or general managers of the underwriters, or against certain of the underwriters: see, *e. g.*, *Biggert v. Hicks*, 42 N. Y. S. 236; *Compton v. Beecher*, 44 id. 887; *Stieg-*

litz v. Belding, 45 id. 670; *Ralli v. White*, 47 id. 197; of employers against loss from damages for injuries received by their employes: see, *e. g.*, *Embler v. Hartford Steam Boiler Inspection & Ins. Co.*, 158 N. Y. 431; *People v. American Steam Boiler Ins. Co.*, 41 N. Y. S. 631; *Glens Falls Portland Cement Co. v. Travellers' Ins. Co.*, 162 N. Y. 399; *Anoka Lumber Co. v. Fidelity & Casualty Co.*, 63 Minn. 286; *Chicago Sugar Ref. Co. v. American S. B. Co.*, 48 Fed. Rep. 198; 57 id. 294; *Employers' L. Ass. Co. v. Merrill*, 155 Mass. 404; *People's Ice Co. v. Employers' L. Ass. Co.*, 161 Mass. 122; of fidelity on the part of persons holding public or private positions of trust and of employees: see *People v. Rose*, 174 Ill. 310; *Fidelity & Casualty Co. v. Eickhoff*, 53 Minn. 170; *infra*, ch. 30; of growing crops from injury: *infra*, § 79; against losses by common carriers from injuries sustained by their passengers: see *Trenton Passenger Ry. Co. v. Guarantors' Liability Indemnity Co.*, 60 N. J. L. 246. Such new forms of insurance are properly treated as within a statute of general insurance, though the new forms were unknown when such statute was enacted. *People v. Rose*, 174 Ill. 310, 315.

now a wager and now a stipulation, a security, a sale, a letting to hire, a partnership, a mandate, and the like; and their several conflicting claims can only be settled by a deep plunge into the theory of the Roman law upon the subject of these several pacts, where we might perhaps lose ourselves in the subtleties of interpretation. But these different characters have been attributed to it according to the point of view occupied by each different writer, and with reference to some special application to a particular subject-matter, rather than in accordance with considerations drawn from the nature of the contract itself. But it is a contract governed by the same principles which govern other contracts.¹ (a) Like all other contracts it must have its reciprocal consent, and a consideration therefor. "The consent of the contracting parties in all things which constitute the substance of the contract," says Pothier,² "is of the essence of the contract of insurance as of all other contracts." It is, however, a peculiar contract, distinguished by special characteristics, and requiring for its proper elucidation to be interpreted in the light of the circumstances in the midst

¹ *Cornfoot v. Fowke*, 6 M. & W. 358.

² *Traité de Cont. d'Ass.* No. 87.

(a) As in other contractual cases, the contract must be definite and certain, and such as to bind both parties, — the one to insure, the other to pay the premium; and the parties must also have agreed upon all essential terms. If their minds have not met, there is no liability for a loss; as where the rate of premium is left undetermined, or the time when the policy shall attach, or the apportionment of the risk, has not been agreed upon, or the insured retains control over the premium note or over any papers the delivery of which is a condition precedent; or if anything remains to be done by the insured as a condition precedent. *Croft v. Hanover F. Ins. Co.*, 40 W. Va. 508, 513; *Taylor v. State Ins. Co.*, 107 Iowa, 275. The contract is not consummated until the application is

accepted; but when it is accepted, and nothing remains for the applicant to do, the contract is complete and binding, actual delivery of the policy to the insured not being essential to its validity, unless expressly made so by its terms. *New York L. Ins. Co. v. Babcock*, 104 Ga. 67, 70; 69 Am. St. Rep. 134, 143, and note; *Phoenix Ass. Co. v. McAuthor*, 116 Ala. 659; *Dibble v. Northern Ass. Co.*, 70 Mich. 1. The insurer's failure to respond to an application implies a rejection and not an acceptance of the risk. *More v. New York Bowery F. Ins. Co.*, 130 N. Y. 537.

In life insurance, the courts will not decide upon the validity of a policy during the assured's lifetime. *Honour v. Equitable L. Ass. Society* [1900], W. N. 67.

of which it has grown up and with a just appreciation of the purposes which it is designed to effect.¹

§ 4. **A Conditional Contract.** — It is, moreover, a conditional contract; for when no risk attaches no premium is to be paid, or if paid, must, in the absence of fraud, be returned to the assured.² (a) In point of fact, the contract is to pay the premium on condition that the risk is run, and the refunding a premium is of frequent occurrence in maritime insurance; and that, too, in cases where it is entirely optional with the assured whether the property insured shall be put at hazard or not, as where the ship is never despatched by the owner on the projected voyage. The language of Lord Mansfield in *Tyrie v. Fletcher*, above cited, is explicit. "When the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned." And this principle is alike applicable to all policies of insurance. The language of the continental writers, generally, is in accordance with this doctrine. It would seem, therefore, says Alauzet,³ that the engagement of the assured is not absolute, but conditional, like that of the insurer; that of the latter depending upon the condition that an accident happen, and that of the former upon the condition that the subject-matter of insurance be put at risk. The Italian writers, however, maintain with great unanimity that when once the contract has been signed, the premium is absolutely due to the insurer, and is irrevocable; and, reasoning according to the analogies of the contract of sale, which will not permit the purchaser to recant at pleasure, and demand back the purchase-money, ask, with some significance, why the insurer should be made the victim of an act to which he is a total stranger, for which he is in no

¹ Emerigon, *Traité des Assurances*, c. 1, § 2.

² *Stevenson v. Snow*, 3 Burr. 1237; *Tyrie v. Fletcher*, Cowp. 666; Pothier, *Du Cont. d'Ass.* 4; Pardessus, *Droit Commercial*, 596, 3; 2 Marsh. 663; *post*, §§ 567, 569.

³ *Traité Gén. des Assurances*, 179.

(a) This applies to both fire and life insurance. *Jones v. Ins. Co.*, 90 Tenn. 604; *United States Life Ins. Co. v. Smith*, 92 Fed Rep. 503, 509.

way responsible, and to which the assured himself is in no way compelled.¹ But this strictness of interpretation has not obtained in other and more mercantile communities, where the doctrines of insurance have been developed under the influence of a liberal purpose, so far as consistent with general principles, to foster the spirit of commercial enterprise. In such communities the law is jealous of any hindrance in the way of the complete abandonment of an adventure which may have been determined upon and insured, but which, subsequent information may show, would be imprudent or disastrous; and it takes care that the fact of having paid the premium shall have no influence upon the deliberation whether to proceed or abandon.

§ 5. **An Aleatory Contract.** — It is also what the French writers term an *aleatory*² contract, or one in which the equivalent consists in the chances for gain or loss, to the respective parties, depending upon an uncertain event, in contradistinction from a commutative contract, in which the thing given or act done by one party is regarded as the exact equivalent of the money paid or act done by the other.³ Each party runs his risks. The insurer will gain the premium if no loss happens; and will be obliged to make reparation if it does. (a) On the other hand, the insured will, in the former case, have paid his premium to no purpose; while, in the latter, he will be indemnified for his loss by the insurer.⁴

§ 6. **A Personal Contract.** — It is also a personal contract

¹ Alauzet, *ubi supra*.

² From *alea*, a die, dice, or throw of the dice; a word for which our adjectives, "gaming" and "hazardous," are not exact equivalents.

³ Code Civil, 1104.

⁴ Rogron, *Code de Commerce Expliqué*, title x.; Des. Ass. Int.

(a) Even when the insured suffers no loss, yet if the insurer becomes insolvent and makes an assignment for the benefit of its creditors, the policy is thereby cancelled and the insured is entitled to recover back the unearned

premium for the balance of the time named in the policy subsequent to the assignment. *Smith v. National Credit Ins. Co.*, 65 Minn. 233. See *infra*, § 358, note.

and does not run with the title to the property.¹ (a) Whether the subject-matter of insurance be a ship or a building or a life, or whatever else it may be, although in popular language it may be called an insurance upon the ship or building or life, or some other thing, yet it is strictly an agreement with some person interested in the preservation of the subject-matter, to pay him a sum which shall amount to an indemnity, or a certain sum agreed upon as an indemnity, in case his interest in the subject-matter shall suffer diminution of value, from certain specified causes, or in certain specified contingencies.² It is a mere special agreement with a party seeking to secure himself against apprehended loss on account of his interest in a particular subject-matter, and not at all incidental to or transferable with the subject-matter.³ The contract of insurance does not run with the subject-matter of insurance, unless by special stipulations wholly foreign to itself, either interpolated in the contract, or in addition thereto. Satisfaction is to be made to the person insured for the loss he may have sustained; for it cannot properly be called insuring the thing, since there is no possibility of doing it, and therefore must mean insuring the person from damage.⁴ And it is because of this personality of the contract that it has been held that if a mortgagee in possession for condition broken insure his interest in the premises without any agreement therefor between him and the mortgagor, and a loss happens for which the mortgagee is indemnified by the insurers, the mortgagor, on a bill to redeem and for an account, is not entitled to have the amount paid to the mortgagee deducted from the amount of

¹ [Quarles v. Clayton, 87 Tenn. 308.]

² Wilson v. Hill, 3 Met. (Mass.) 66; Disbrow v. Jones, Harr. (Mich.) Ch. 48.

³ Carpenter v. Providence Wash. Ins. Co., 16 Pet. (U. S.) 495.

⁴ Sadlers' Company v. Badcock, 2 Atk. 554; Lynch v. Dalzell, 4 Bro. Par. Cas. 431. See also *post*, §§ 379, 456.

(a) As an insurance contract is a personal one between the insured and the insurer, a provision in the policy that it shall cease to be in force if a change takes place in the insured's title without the insurer's consent, is valid and reasonable. Farmers & Merchants Ins. Co. v. Jensen, 56 Neb. 284, 286; Milwaukee Mechanics' Mutual Ins. Co. v. Ketterlin, 24 Ill. App. 188; Langdon v. Minnesota Farmers' Mutual Fire Ins. Ass'n, 22 Minn. 193; *infra*, § 264.

his charges for repairs.¹ A contract may, however, be so framed as to secure successive owners of the same property.²

§ 7. *Purpose.* — A distinction has sometimes been taken between marine and other insurances, and life insurance, on the ground that while the former have for their object to indemnify for loss, the latter is an absolute engagement to pay a fixed sum on the happening of a certain event, without reference to any damage in fact, suffered by the insured in consequence.³ But this distinction is superficial, and rests rather upon the mode of applying the principles and of determining the amount of indemnity, than upon any difference in the principles themselves. Insurance upon a ship or a house at a fixed valuation, and at an annual premium, until one is lost or the other is burned, is in no way different in principle from the insurance of a life at a fixed valuation and at an annual premium, until death. And there may be between the vigor of manhood and the decrepitude of old age the same change in value that the house or the ship may undergo. In the one case, the insurance is against the loss of capital, which produces income; in the other, it is against the loss of faculties, which produce income. There is the same difference, having reference to the question of indemnity, between valued and open policies in both fire and marine insurance that there is between an open policy in either and a policy of life insurance. In open policies the question of the amount of the indemnity is left to be determined when the contingency upon which it becomes due shall have happened, while in valued policies and policies on lives the value of the interest which the insured seeks to protect is agreed upon by the parties and inserted in the policy, and so the amount of indemnity which shall

¹ *White v. Brown*, 2 Cush. (Mass.) 412; *Cushing v. Thompson*, 4 Red. (Me.) 496. See also *Leeds v. Cheetham*, 1 Sim. 146; *Mildmay v. Folgham*, 3 Ves. Jr. 472; *Watson v. Bratton*, in Eq. 1830, cited by Ellis, *Fire and Life Insurance and Annuities*, 155; *Adams v. Rockingham Mut. Fire Ins. Co.*, 29 Me. 292. See also *post*, § 72.

² *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606.

³ Babbage's "Comparative View of the Various Institutions for the Assurance of Lives," 154; *Dalby v. India & London Life Assurance Co.*, 15 C. B. 365; s. c. 28 Eng. L. & Eq. 312.

become due on the happening of the given contingency is predetermined. The purpose in all cases is alike, — indemnity for the loss of a valuable interest. That in some cases the value is fixed with great precision, while in others it is of such a speculative character as to admit of the greatest latitude of estimate, not to say of conjecture, does not make it the less a valuable interest. There must be this interest to support the contract. This is essential. What it shall be, provided it be valuable, and how its value shall be arrived at, are simply incidental questions; and, however they may be answered, do not change the nature of the contract from one of indemnity based upon an interest to be protected, to a mere wager based upon no interest whatever. The analogies between life and marine policies have been matters of frequent judicial observation.¹ When it is said that fire, life, and other insurances, where valued policies obtain, are contracts of indemnity, it is simply intended that to support them the insured must have some interest in the thing insured. The amount of this interest, and the amount to be paid in case of loss, may be fixed by arbitrary agreement, even before the loss, according to the modern practice, if not strictly according to the ancient doctrine, of insurance.²

§ 8. In one case, after much consideration, it was said that the contract commonly called life insurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life, and, when once fixed, it is constant and invariable. The stipulated amount of

¹ See further upon this subject, *post*, §§ 116, 117.

² *Whiting v. Ind. Mut. Ins. Co.*, 15 Md. 297; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40; *Borden v. Hingham Mut. Fire Ins. Co.*, 18 Pick. (Mass.) 523; *Miller v. Eagle Life and Health Ins. Co.*, 2 E. D. Smith (N. Y. C. P.), 268; *Loomis Adm. v. Eagle Life and Health Ins. Co.*, 6 Gray (Mass.), 396; *Bevin v. Conn. Mut. Life Ins. Co.*, 23 Conn. 244; *Trenton Mut. Life & Fire Ins. Co. v. Johuson*, 4 Zab. (N. J.) 576; *St. John v. Am. Mut. Life Ins. Co.*, 13 N. Y. 31.

annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bounties have been paid by prosperous offices) the same on the other. This species of insurance, it was also said, in no way resembles a contract of indemnity, and in this respect differs from policies against fire and against marine risks, which are both properly contracts of indemnity, — the insurer engaging to make good, within certain limited amounts, the losses sustained by the assured in their buildings, ships, and effects. In life insurance the loss is sure to come when the insurance is for the whole life, while in marine and fire insurance the loss may not happen within the time covered by the insurance, as is the case under a simple life policy for a limited time. And the case of *Godsall v. Boldero*,¹ as to so much of the decision as held that there must be an insurable interest at the time of the death, was declared to have been decided upon a mistaken analogy between life insurance and marine insurance.² And where a policy is effected by a creditor on the life of his debtor, in pursuance of a contract with his debtor, who, however, is no party to the policy, but supplies the money to pay the premiums, in such case, said Stuart, V. C., referring to the case of *Dalby v. India and London Life Assurance Company*,³ although it may be true that the contract is not one of indemnity as between the parties to the policy, it is, nevertheless, one as between the debtor and creditor; so that after the debt is discharged, and the creditor's interest has ceased, the debtor is entitled to any advantages derivable from the policy.⁴ The case of *Dalby v. India and London Assurance Company*⁵

¹ 9 East, 72.

² *Dalby v. India & London Life Assurance Co.*, 15 C. B. (6 J. Scott) 364 determined in the Exchequer Chamber. And see also *Law v. London Indisputable Life Policy Co.*, 1 Kay & Johns. 223. And the general doctrine of these cases has been adopted by the Supreme Court of the United States. *Conn. Mut. Life Ins. Co. v. Schaefer*, 4 Otto (U. S.), 457; s. c. and note, A. L. Reg. 16, n. s. 392. In this case it was unsuccessfully contended that, a divorce *a vinculo* having terminated the wife's interest in the life of her husband, she could not recover.

³ 15 C. B. (6 J. Scott).

⁴ *Knox v. Turner*, 21 L. T. N. s. 701; s. c. L. R. 9 Ch. 155. ⁵ *Ubi supra*.

turned upon the question, not whether there should be an insurable interest, which was admitted, but whether that interest should subsist as well at the time of the death as at the time of entering into the contract. That a valuable interest, for the loss of which indemnity might be claimed, must exist at some time, as the support of the policy, was conceded. This case will be further considered when we come to treat of insurable interest.¹

§ 9. **Reinsurance.** — Reinsurance is merely insurance applied in a special way and to cover, in whole or in part, a particular risk already assumed. When an insurer finds it prudent or convenient to protect himself from loss by reason of any liability he has assumed under a policy, he may contract with another to relieve him from that liability, and take it upon himself. This is to reinsure; and by the contract the reinsurer, except as to the matter of premium, which may be more or less than that paid on the original policy, as the parties may agree, undertakes with reference to the first insurer what the first insurer undertakes with reference to the insured, and subject to like rights, duties, and obligations.²

§ 10. **Formerly prohibited.** — Reinsurance was formerly prohibited in England by statute 19 Geo. II. c. 371; but this prohibition was peculiar to England, and was made not from any objection to the practice when confined to its legitimate purpose, — to save the party procuring the reinsurance from the consequences of an imprudent contract, — but from the fact that it came to be perverted into a mode of speculating in the rise and fall of premiums, and might, therefore, be made a cover for wager policies.³ But now, by the law and practice of every country, not excepting England, the underwriter may have the entire sum he has insured reinsured to him by some other underwriter. It is a common practice in this country.⁴

¹ *Post*, § 115 *et seq.*

² *Canada Mut. Fire Ins. Co. v. Northern Ins. Co.*, 2 Ct. of App. (Ont.) 373.

³ *Arnonld, Ins.* 1, 290; *Andrée v. Fletcher*, 2 T. R. 161; 3 Law Mag. (3d series) 579.

⁴ *Phil. Ins. c.* 3, § 13; *Merry v. Prince*, 2 Mass. 176; *Hastie v. De Peyster*,

§ 11. **Reinsurance defined.** — It is a contract of indemnity to the reinsured, whatever be the subject-matter, and binds the reinsurer to pay to the reinsured the loss sustained in respect to the subject insured, to the extent for which he is reinsurer,¹ and not necessarily differing in form from an original insurance.² (a) [Reinsurance may be for a less risk than the original insurance but not for more.³ If upon loss the insurer pays a less sum than the original insurance agreed on, the sum so paid will be taken as the amount of damage sustained, and the measure of indemnity to be recovered from the reinsuring company, provided such sum is within the amount of the reinsurance and does not exceed the loss, and there is no provision in the policy of reinsurance for prorating or limiting liability.⁴] The reinsured, in order to recover against the reinsurer, must prove his risk

3 Caines' (N. Y.), 190 *b*; *Herckenrath v. Am. Mut. Ins. Co.*, 3 Barb. (N. Y.) Ch. 63; *Arnould, Ins.* 1, 290; *Consolidated Real Estate & Fire Ins. Co. v. Cashow*, 41 Md. 59. It seems that 19 Geo. II. c. 371 applied only to marine insurance, and, so far as this is concerned, it was in force in Maryland in 1874.

¹ *Hone v. Mut. Saf. Ins. Co.*, 1 Sand. Superior Ct. Rep. (N. Y.) 137. [The reinsuring company need pay no more than is paid by the first insuring company. The contract of reinsurance is one of indemnity, not of profit. *Ill. Mut. Ins. Co. v. Andes Ins. Co.*, 67 Ill. 362, 365.]

² *New York Bow. Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. (N. Y.) 359.

³ [*Philadelphia Ins. Co. v. Wash. Ins. Co.*, 23 Penn. St. 250, 253.]

⁴ [*Insurance Co. v. Insurance Co.*, 38 Ohio St. 11.]

(a) The object being indemnity against the insurer's own act, he may have the entire sum insured by him reassured by some other insurer. *Ins. Co. of North America v. Hibernia Ins. Co.*, 140 U. S. 565. This, however, is rarely done, the original insurer usually retaining part of the risk, in which case he looks to the reinsurer for indemnity up to the full amount reinsured. See *Chalarton v. Ins. Co. of North America*, 43 La. An. 1582, 1585, 1589. That reinsurance by a corporation may be *ultra vires*, see *Twiss v. Guaranty Life Ass'n*, 87 Iowa, 733; *Jameson v. Hartford F. Ins. Co.*, 44 N. Y. S. 15. The right to procure contracts of fire reinsurance is founded upon the insurable interest arising out of the original con-

tract of insurance; hence while valid as to policies already existing, reinsurance is void as a wager as to policies thereafter to be written. *Sun Ins. Office v. Merz* (N. J. L.), 43 Atl. 693. This does not, however, invalidate reinsurance on marine fire risks, so far as fire is treated as a part of the marine risk. *Boston Ins. Co. v. Globe F. Ins. Co.*, 174 Mass. 229; *Continental Ins. Co. v. Ætna Ins. Co.*, 138 N. Y. 16. See *Iowa L. Ins. Co. v. Eastern Mut. L. Ins. Co.* (N. J.), 45 Atl. 762. As reinsurance is not always upon the same risk as the original insurance, and as there is no general form of marine policy, there is no presumption that a reinsured marine risk is the same as that originally insured. *Penn. Ins. Co. v. Telfair*, 61 N. Y. S. 322.

or interest in the subject-matter, and the fact and amount of loss, in the same manner as the original insured must have proved them against him;¹ and the reinsurer is entitled to make the same defence to an action brought against him on the second policy as the original insurer might have done on the first policy.² (z) It is not necessary for the reinsured to pay the loss to the first insured before proceeding against the reinsurer,³ nor is the liability of the latter affected by the insolvency of the reinsured, or his inability to fulfil his own contract with the original insured. Nor is it competent, unless so agreed, to limit the liability on a contract of reinsurance by proof of a usage in the place where the contract is made, by which the reinsurer pays the same proportion of the entire loss sustained by the original insured that the sum reinsured bears to the first insurance written by the reinsured.⁴ Under an agreement, however, that the reinsurer shall be liable *pro rata*, and only in the same manner and at the same time as the reinsured, the liability of the reinsurer is limited to indemnity. And the provision as to time means, that payment shall be made by the reinsurer in point of time, as the reinsured had contracted to make it.⁵ [A clause in a reinsurance policy that the reinsurer shall only pay *pro rata* at and in the same time as the assured has no reference to insolvency of the reinsured.⁶] The liability of the reinsurer, unless specially limited by agreement, is coextensive with that of the reinsured. When, by the terms of the reinsurer's policy, suit may be brought directly

¹ 3 Kent, Com. 279 ; *Yonkers Ins. Co. v. Hoff. Ins. Co.*, 6 Rob. (N. Y.) 316.

² *New York Mar. Ins. Co. v. Prot. Ins. Co.*, 1 Story, C. Ct. 458 ; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443. [*Merchant's Mut. Ins. Co. v. New Orleans Mut. Ins. Co.*, 24 La. An. 305 at 307.]

³ [*Gantt v. American Cent. Ins. Co.*, 68 Mo. 503, 534.]

⁴ *Hone v. Mut. Saf. Ins. Co.*, 1 Sand. Superior Ct. Rep. (N. Y.) 137. And see *s. c.* affirmed, 2 Comst. (N. Y.) 235.

⁵ *Blackstone v. Alemannia Ins. Co.*, 56 N. Y. 104 ; *Ill. Mut. Ins. Co. v. Andes Ins. Co.*, 67 Ill. 362 ; *Republic Ins. Co., In re* (U. S. Dist. Ct.), 8 Nat. Bank. Reg. 197 ; *s. c.* 3 Ins. L. J. 390 ; *Norwood v. Resolute Fire Ins. Co.*, 4 J. & Sp. (N. Y.) 552 ; *Consolidated, &c. Fire Ins. v. Cashow*, 41 Md. 59 ; *Cashau v. N. W. N. Ins. Co.*, 5 Biss. (U. S. Dist. Ct.) 476 ; *Norwood, Ex parte*, 3 Biss. C. Ct. 504.

⁶ [*Cashau v. North Western Nat. Ins. Co.*, 5 Biss. 476, 479.]

by the original insured against the reinsurer, the latter cannot defend on the ground that the first insurer has been paid on other policies of reinsurance upon the same risk of life. That, however, may be a matter for adjustment between the reinsurer and the reinsured.¹ (z₁) Where the reinsurer has notice from the reinsured that a suit has been commenced against the latter, and that the former will be looked to for the costs and expenses of defence, and no objection is made by the reinsurer, and the reinsured has just grounds for contesting the claim, the reinsurer will be holden to pay to the reinsured the costs and expenses of such defence in addition to the actual loss. But costs and expenses, wantonly and unnecessarily so incurred, when there is no reasonable ground of defence, and when there is no express or implied sanction of the defence by the reinsurer, cannot be recovered by the reinsured.² A party obtaining a policy of reinsurance is bound to communicate all facts within his knowledge, and to conceal none material to the risk; and if he fail in this behalf, whether from design or misapprehension of their materiality, as in cases of original insurance, the policy of reinsurance will be void.³ [For example, underwriters applying for reinsurance are bound to tell what they know of the character of the assured.⁴ So where M had double insurance on his ship and its earnings. This fact was known to the Ocean Company, and was not communicated to the Sun Company when the latter issued a policy to reinsure the Ocean Company, on its risk for M. Knowledge of the circumstance was manifestly material. It was a flagrant case of overinsurance, that made it the pecuniary interest of the master to disregard the safety of the ship. The assured will not be allowed to protect himself

¹ *Glen v. Hope Mut. Life Ins. Co.*, 56 N. Y. 379.

² *New York Mar. Ins. Co. v. Prot. Ins. Co.*, 1 Story, C. Ct. 458; *Hastie v. De Peyster*, 3 Caines (N. Y.), 190 b; *Strong v. Phenix Ins. Co.*, 62 Mo. 289; *Strong v. Am. Central Ins. Co.*, 4 Mo. App. 7; *Gantt v. Am. Central Ins. Co.*, Sup. Ct. Mo., 9 Ins. L. J. 664.

³ *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. (N. Y.) 359; *People's Ins. Co. v. Hartford Ins. Co.* (U. S. C. Ct., North Dist. Cal.), 1 Ins. L. J. 875; 68 Mo. 503.

⁴ [*New York Bowery F. Ins. Co. v. New York Ins. Co.*, 17 Wend. 359, 367.]

against the charge of undue concealment by affirming that he had disclosed the truth in *general* terms. Where his information is specific it must be communicated specifically. He must see to it that the insurer's knowledge is substantially as full and particular as his own.¹ Justices Miller, Waite, and Bradley dissented, holding that a reinsurer was not to be looked at in the same light as a joint insurer or an original insurer, — that in point of fact, the Sun Company insured the risk the Ocean Company had taken, and unless there were misrepresentation, fraud, or intentional concealment, the Sun ought to pay the loss the Ocean had incurred. There had been a course of dealing between the companies in which the Sun had been in the habit of reinsuring the Ocean, without inquiry into the particulars.² As the reinsurer merely substitutes himself for the original insurer, he can make no defence that the latter could not. Hence a representation which was true when the original policy was made, but was false when the reinsurance was made, is of no avail to the reinsurer.³ [Neither can a misrepresentation in the description of the property in the original application be taken advantage of by the reinsurer. The risk of the insurer is the object of reinsurance, and if this was correctly stated and the insurer has been found legally liable for a loss, the reinsurer must pay.⁴] The notice of loss from the original insured to the reinsured, if sufficient, and it be immediately forwarded to the reinsurer, will be sufficient notice to the latter.⁵ [Upon a constructive total loss, notice of the abandonment of the ship need not be given to the reinsurers.⁶] Where the reinsurer stipulates that the reinsured policy is subject to the conditions of settlement as set forth in the latter, no preliminary proof need be furnished by the latter to the former.⁷ [In a con-

¹ [Sun Mut. Ins. Co. v. Ocean Ins. Co., 107 U. S. 485, 505, 510.]

² [Id. 511.]

³ Cahen v. Continental Life Ins. Co., 69 N. Y. 300.

⁴ [Jackson v. St. Paul F. & M. Ins. Co., 99 N. Y. 124.]

⁵ See cases in note 3, preceding page (p. 16).

⁶ [Uzielli v. Boston M. Ins. Co., 15 Q. B. D. 11.]

⁷ Consolidated, &c. Fire Ins. Co. v. Cashow, 41 Md. 59; s. c. 3 Ins. L. J. 757.

tract of reinsurance which follows the original policy, except that "reinsurance" is substituted for "insurance," and which provides for proofs of loss, &c., attested by "their oath," it is sufficient if the oath of the original assured without that of the original insurers, is procured.¹ Where the insurer agreed with the reinsurer to defend against the suit of the insured, the insurer to act in the matter as agent of the reinsurer, and the insurer, instead of contesting the action, without the knowledge of the reinsurer settled it and had it dismissed, it was held that the insurer could not recover of the reinsurer.²

[§ 11 A. **Extent of the Reinsurer's Liability; Insolvency.** — It has already been noted that the contract of reinsurance is one of *indemnity* and that only. The cases and text books are saturated with that doctrine in respect to all varieties of insurance. It is sometimes, however, a very interesting question, what constitutes indemnity. For example, where the original insurer *settles* with the assured for less than the loss for which it was liable, or where it is insolvent and *cannot* pay in full, then how much shall the reinsurer be required to pay? Wood on page 818 says that New York, Indiana, Maryland, and the United States Circuit Court give the reinsurer the benefit of the compromise in case of insolvency, &c., while Illinois does not. It appears, however, that the former authorities refuse to allow the reinsurer to say anything about the insolvency of the insurer, and make the *liability* not the *ability* of the latter the measure of the liability of the insurer, and that Illinois in a very clear case gives the reinsurer the benefit of an *actual settlement* by the insurer. Before examining the cases it may be remarked that on principle the matter seems perfectly clear. If the insurer (A) sues the reinsurer (B) *before* A has reached a final settlement with the assured (C), then the reinsurer must be liable to pay A as much as and no more than A is liable to pay C, unless otherwise clearly agreed, and after B has paid A, the latter may settle as best he can. But if A

¹ [N. Y. Bowery F. Ins. Co. v. N. Y. F. Ins. Co., 17 Wend. 359, 365.]

² [Commercial Union Ass. Co. v. Amer. Cent. Ins. Co., 68 Cal. 430.]

sues B *after* C has been paid all he is to be paid, then A ought to recover no more from B than he paid to C, otherwise he would be getting not indemnity but a profit. If A becomes insolvent and makes a final settlement and is discharged, it ought to recover no more from B than was paid to C, or it would in a sense make money by its own carelessness in failing. When C is paid off, the other creditors can have no claim on what is due from B on C's loss, unless the reinsurance was taken into account in making the calculation of dividends under which C was paid.

The Cases.

Where the reinsured was insolvent and had paid a dividend of 20 per cent before bringing suit against the reinsurer, it was held that the full loss could be recovered, and that "the original assured has no claim in respect of the money so paid."¹ This last sentence seems too sweeping. The assured had no *distinctive* claim on those funds, no claim different from that of any other creditor of the insolvent company, but in common with the other creditors he did have a claim, and it was that fact that made the decision right. The claim against the reinsurer was part of the assets in the hands of the receiver to be administered for the benefit of all the creditors.

It was objected in one case that the reinsurer could not be liable to pay the reinsured any more than the assets of the latter would pay to the insured. But the court held this proposition manifestly unsound, and said that the *liability* not the *ability* of the insurer was the measure of the liability of the reinsurer.² In a subsequent case, the facts as stated were a little different in that a dividend of 44 per cent had been declared, and that "was all that has been or will be paid to the original assured upon their policy." The court decided the question as to the measure of the reinsurer's liability in the same way as in the last case, simply referring to that for reasons. Now, if the dividend had been calculated and paid without reference to this claim against the

¹ [Consolidated Real Estate & F. Ins. Co. v. Cashow, 41 Md. 74.]

² [Hone v. Mut. Safety Ins. Co., 1 Sandf. (Super. Ct.) 137, 152.]

reinsurer, then the case materially differed from the former, and the decision is not well based, but, if, as is possible, though not stated, this claim was one of the things that entered into the calculation of that dividend, the ruling is sound.¹

If the original assured cannot sue the insurer, because, for example, the period of limitation has run against him, then, as there is *no liability* on the part of the insurer, he cannot recover of the reinsurer.²

In Illinois the true doctrine has been clearly announced. The original insurer became liable to pay to the assured the sum of \$6000, but *actually paid \$600 in full discharge of the whole liability*. The court held that only \$600 could be recovered from the reinsurer. The cases above cited in this section are noticed, and the court clearly makes the distinction between cases in which the insurer has actually settled, and those in which full settlement has not been made; and in the latter cases, although not able to pay in full, the insurer, the judge remarks, may with some show of reason recover in full of the reinsurer. But to do so in the former cases would enable it to realize a clear gain above what the fire or other loss has caused it.³

The United States Circuit Court holds that the reinsurer may be sued by the receiver of the insolvent insuring company, for the full amount of the *liability* of the latter, without reference to its assets.⁴ In both cases the matter was still open, no final settlement had been made.]

§ 12. "The original contract," says Emerigon, "subsists precisely as it was made, without renewal or alteration. The reinsurance is absolutely foreign to the first insured, with whom the reinsurer contracts no sort of obligation. The risks which the insurer has assumed constitute between him and the reinsurer the subject-matter of the contract of reinsurance, which is a new contract, totally distinct from

¹ [Blackstone v. Alemannia F. Ins. Co., 56 N. Y. 104.]

² [Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 446.]

³ [Ill. Mut. F. Ins. Co. v. Andes Ins. Co., 67 Ill. 362.]

⁴ [Cashau v. N. W. Ins. Co., 5 Biss. 476; *Ex parte* Norwood, 3 id. 504.]

the first.¹ (a) It cannot, therefore, in the strict sense, be made with the party first insured, for this would be a simple rescission of the contract;² nor does the latter by it acquire

¹ Emerigon, *Traité des Assurances*, c. 8, § 14; *Herckenrath v. Am. Mut. Ins. Co.*, 3 Barb. (N. Y.) Ch. 63.

² [Sometimes however the word "reinsurance" is used to denote a contract by which an old company sells out to a new one, or becomes consolidated with it, so that the new company becomes liable directly to the insured. And it is always competent for the reinsuring company to agree to be directly liable. Where a London company sold out to an American company which reinsured all policies in the former company held in this country, it was held that such a policy-holder could sue the American company for a loss arising under his policy. *Johannes v. Phenix Ins. Co.*, 66 Wis. 50. An agreement by a reinsuring company to pay to the holders of policies "all such sums" as the first company "may by force of such policies become liable to pay," includes a policy-holder who is seeking compensation in damages for a failure of the first company to keep alive its contract by receiving payment of premiums when tendered. *Fischer v. Hope Mut. L. Ins. Co.*, 69 N. Y. 161, 164. In one case a company insured a man for \$15,000, and afterward reinsured \$10,000 of the risk in two other companies. A fourth company subsequently reinsured all the outstanding risks of the first company, after which the insured died. An arbitration then took place between the several companies, as the result of which it was decided that the fourth company was liable only for \$5,000, the two original reinsuring companies being liable for \$10,000 which they had after the loss paid to the first company. On this state of facts it was held that the fourth company was liable to the original

(a) There is no privity between the reinsurer and the person originally insured; the company reinsured has an insurable interest in the insured property, but as an "owner" he has no other relation to it than as the insurer under the original policy, the provisions of which are not always applicable to the new contract. If, for instance, that policy fixes a limited period for suits, this period does not apply to an action upon the policy of reinsurance, and, under a provision against assignment without the insurer's consent, the original insurer may give such consent as against the reinsurer, if he does not thereby increase the risk. *Faneuil Hall Ins. Co. v. Liverpool, &c., Ins. Co.*, 153 Mass. 63; *Royal Ins. Co. v. Vanderbilt Ins. Co.*, 102 Tenn. 264; *Barnes v. Hekla F. Ins. Co.*, 56 Minn. 38; *infra*, § 12 B. The insured and reinsurer may, however, so contract, through new papers, as to make them

privies, and the insured risk be merely transferred. See, *e. g.*, *People's Mut. Ass. Fund v. Boesse*, 92 Ky. 290. An agreement by one insurance company to pay the losses of another company like its own losses, is not reinsurance; under the statutes of California, the first of these companies is liable directly to the insured under policies issued by the second company. *Whitney v. American Ins. Co. (Cal.)*, 56 Pac. 50. See *Barnes v. Hekla F. Ins. Co.*, 56 Minn. 38; *Travellers' Ins. Co. v. California Ins. Co.*, 1 No. Dak. 151. In general, however, under an agreement by one company to give a limited free insurance to the policy holders of another company, which is insolvent, the substituted policies need not conform to, and are not controlled by, the original policy issued by the second company. *Brown v. U. S. Casualty Co.*, 88 Fed. Rep. 38; 90 id. 829.

any rights against the reinsurer, in case of the insolvency of the reinsured, or any claim upon the money to be paid to the latter.¹ If the insurer be not liable, he cannot recover of the reinsurer, for the reason that the insurer has no insurable interest, and can suffer no loss, where there is no liability.² Where, in a policy of insurance there is a stipulation that the reinsurer is to be liable only for his proportion of the loss, if there shall be other insurance, other insurance means other insurance of a like kind, that is, other reinsurance.³ And an agreement by the reinsured to retain an amount of the original insurance at least equal to the amount of reinsurance is practically an agreement not to further reinsure, and is not violated by allowing the amount originally insured to be reduced by the lapse of a policy to an amount slightly (from \$2,800 to \$2,500) less than the amount reinsured.⁴ That the interest sought to be covered is an insurer's interest need not be stated, as this is not material.⁵

[§ 12 A. An agreement of reinsurance is not within the statute of frauds as a contract to answer for the debt or default of another.⁶ When a charter of an insurance company does not expressly give power to reinsure, but is made subject to a General Insurance Act which does, a contract of reinsurance is not *ultra vires*.⁷]

assured for the full amount of \$15,000; that the assured had accepted the agreement for reinsurance made by them, and was not affected by the arbitration. *Glenn v. Hope Mut. L. Ins. Co.*, 1 N. Y. Supr. Ct. 463.

¹ Alauzet, *Traité Général des Assurances*. 152.

² *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *New York Mar. Ins. Co. v. Prot. Ins. Co.*, 1 Story, C. Ct. 458; *Carpenter v. Providence Ins. Co.*, 16 Pet. (U. S.) 495; *Del. Ins. Co. v. Quaker City Ins. Co.*, 3 Grant's Cases (Penn.), 71.

³ *Mut. Saf. Ins. Co. v. Hone*, 2 Comst. (N. Y.) 235.

⁴ *Canada Fire & Mar. Ins. Co. v. Northern Ins. Co.*, 2 Ont. App. R. 373.

⁵ *Mackenzie v. Whitworth*, L. R. 1 Ex. D. 36; s. c. 2 Central Law J. 493 and note; s. c. affirmed 3 App. Cas. 281. The insured, in a policy of reinsurance, means the reinsured. *Carrington v. Com. Fire & Mar. Ins. Co.*, 1 Bosw. (N. Y. Supr. Ct.) 152.

⁶ [Bartlett v. Fireman's Fund Ins. Co., 77 Ia. 155. The contract of reinsurance has been held to be within the Statute of Frauds, as a promise to pay the debt of another. *Egan v. Fireman's Ins. Co.*, 27 La. An. 368. But this cannot be good law. *Com. Mut. Mar. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318.]

⁷ [Fame Ins. Co.'s Appeal, 83 Pa. St. 396, 406.]

[§ 12 B. In an ordinary policy used in making a contract of reinsurance, the conditions that no action shall be maintained until after an award shall have determined the amount of the claim, nor unless begun within twelve months after loss, do not affect the reinsurance.¹ Where a policy of reinsurance provides that it is to be subject to the same risks, conditions, privileges, assignments, mode of settlement, &c., as are, or *may be* assumed or adopted by the insurer, the reinsurer is bound by the action of the insurer in assenting to an assignment of the original policy to a purchaser at a foreclosure sale.² Such an assent ought not to release the reinsurer even in the absence of express provision. A waiver of condition made by the insurer in good faith, and not increasing the burden of the reinsurer, does not release the latter.³]

[§ 12 C. Where a mutual company reinsures all its risks, and has a surplus in the treasury consisting of cash payments by present and past policy-holders, with interest from the investment of the same, this fund is not properly distributed among the policy-holders at the time of reinsurance, but must go to all policy-holders past and present in such proportion as they contributed to create the said fund, *i. e.* according to the amount of their respective payments.⁴ A contract of reinsurance "on risks in the State of New York and not elsewhere" does not include policies issued in New York on property situated in Canada, or elsewhere out of the State of New York, although such policies are scheduled, and the reinsurance policy refers to "the property hereinafter described as per schedule annexed" as that which is insured.⁵]

[§ 12 D. Where the defendant company made a contract to reinsure the plaintiff, the policy purporting to be for a year, without stating when the year began, and the original

¹ [Jackson v. St. Paul F. & M. Ins. Co., 99 N. Y. 124.]

² [Manufacturers' F. & M. Ins. Co. v. Western Ass. Co., 145 Mass. 419, 424.]

³ [Fire Ins. Ass. v. Can. F. & M. Ins. Co., 2 Ont. R. 481 (assent of insurer to mortgage)]

⁴ [Smith v. Hunterdon County Mut. F. Ins. Co., 41 N. J. Eq. 473.]

⁵ [London, &c. Ins. Co. v. Lycoming Ins. Co., 105 Pa. St. 424.]

policy issued some weeks before the reinsurance was for a year *from February 24*, it was held that the reinsurance covered the *same* period, and the defendant was held for a loss within the original policy although occurring before the date and issue of the reinsuring policy, and although the latter did not show on its face that it was a policy of reinsurance. Parol evidence of the facts of the case is admissible to show that the contract is really one of reinsurance, and so fix the date of the beginning of the risk.¹ (a)]

§ 13. **Double Insurance.** — When two or more policies are taken out upon the same interest,² it is called double insurance. Policies usually contain a clause that in case of other insurance, that is, double insurance, the several insurers shall be liable, each for such a proportion of the loss as the several amounts insured bear to each other. This prevents the recovery of more than the whole loss by the insured. And if there were no such provision, since the insured is only entitled to an indemnity, he can recover no more than this, however much may be the amount. He has his election of two courses.³ He may sue each company for its proportion, or he may resort to any one of the insurers to recover his whole loss; and in that case, the insurer paying the loss will have claims over against the other insurers for their respective proportions, the several concurrent insurers being regarded as identical in interest.⁴ This question of

¹ [Phil. L. Ins. Co. v. Am. L. & Health Ins. Co., 23 Pa. St. 65.]

² [Insurance on the interests of different persons, though on the same goods, is not double insurance. *Wells v. Philadelphia Ins. Co.*, 9 S. & R. 103, 107. Insurance by the shipper and by the carrier is not double insurance, and does not entitle one company to contribution from the other. *Royster v. Roanoke N. & B. S. B. Co.*, 26 Fed. Rep. 492 (N. C.), 1886.]

³ [The assured may consider each debtor as liable for a proportional share of the loss, or he may require any one to pay the whole. *Wiggin v. Suffolk Ins. Co.*, 18 Pick. 145, 153.]

⁴ *Gordon v. London Assurance Co.*, 1 Burr. 492; *Lucas v. Jefferson Ins. Co.*, 6 Cow. (N. Y.) 635; *Stacey v. Franklin Fire Ins. Co.*, 2 W. & S. (Penn.) 506;

(a) Under a usage by which reinsurance begins from the date of the reinsurance contract, the reinsurer is not liable for a loss which has already occurred at that date without either party's

knowledge, when there is nothing to show the insurer's intention to give a retrospective effect to the reinsurance. *Union Ins. Co. v. American F. Ins. Co.*, 107 Cal. 327.

double insurance will be further and more particularly considered when we come to speak hereafter of conditions with reference to other insurance.¹

Newby v. Reed, 1 W. Black. 416 ; *Peoria Mar. & Fire Ins. Co. v. Lewis*, 18 Ill. 553 ; *Baltimore Fire Ins. Co. v. Loney*, 20 Md. 20 ; *Sloat v. Royal Ins. Co.*, 49 Pa. St. 14 ; *Merrick v. Germania Fire Ins. Co.*, 54 id. 277 ; *Millaudon v. West, Mar. & Fire Ins. Co.*, 9 La. 27.

¹ *Post*, § 364.

CHAPTER II.

OF THE FORM OF THE CONTRACT AND THE PARTIES THERETO.

ANALYSIS.

1. PAROL CONTRACTS (see ch. v. anal. C.).

- §§ 14-25. The contract may be by parol so as to bind the company, although usage requires writing (§§ 14, 18), and even although the charter (§§ 14, 15, 23) speaks of no other than written agreements. If the charter expressly prohibits parol it becomes a question in the law of *ultra vires* whether such a contract would be good (see also ch. iv. anal. 5, and §§ 128, 129, 151).
- § 22 A. The parol insurance usually made contemporaneously with the agreement to issue a policy remains in force until the policy is issued in proper form, and the condition in the policy that the premium must be paid before liability attaches does not apply to the preliminary parol contract.
- § 23. If no policy is executed suit will lie on the memorandum.
- § 23. The terms of a parol agreement for a policy are, in the absence of specification, presumed to be the same as those of the ordinary policies issued by the company on similar risks.
- § 23 A. A parol contract for a policy will be specifically enforced. The company will have to pay for a loss occurring after the agreement to give a policy and before its issue, unless it is specially agreed otherwise.
- § 23 B. Sometimes doubtful whether the agreement is one of insurance final, or for the issue of a policy, and custom is competent evidence. The facts may show only a personal agreement of the agent to procure insurance.
- § 23 C. The statute of frauds does not affect fire-insurance contracts even though they cover several years; and though a peril within the statute is included in a fire contract, it is good as a fire risk.
- § 23 D. On principle an oral contract of insurance intended to be final is good, as well as a contract looking to the issue of a policy, when the insurer is a private party and no statute intervenes. Corporations, however, have only such powers as are granted to them, and not, as with individuals, all that were not taken away from them. The first question is, How far does the law under which the company exists authorize it to make oral contracts? The second is, If it has exceeded its powers, is the contract void? And this depends on the legislative intent which, when not expressed, is to be judged in the light of the purpose of the law, the persons for whose benefit it was made, the injustice of allowing a person to repudiate a contract and retain the benefit of it, the propriety of protecting an

CH. II.] FORM OF CONTRACT AND PARTIES THERETO.

innocent person who has given value, and the equitable principle that substance, not form, is to be looked to. Mere informality should not vitiate the contract unless the legislative intent to that effect is very clear.

- § 24. A parol agreement to extend or modify a policy is good even though it is under seal, and the authority of agents to make such oral agreements may be inferred from the course of dealing.
- § 25. The rule in England is doubtful. It is also a question whether Congress can declare unstamped contracts void, so as to affect them in any other than the Federal courts.

2. THE FORM.

- § 26. Policies are usually very lax and informal, but a long course of decisions has fixed the meaning of the terms in general use.
- § 27. The form is unessential, but the terms must be specified or fixed by previous dealings or in some other way. Signature of *de facto* officers sufficient. Seal not necessary unless positively required by the charter (see §§ 16, 17). A contract executed without seal by mutual mistake will be reformed. A policy may be left blank and the names of the insured filled in at any time. The policy must be headed with the company's name (Pub. Stats. 720), and if varying from the standard form the slips, riders, &c., must be signed by the officer or agent (*Id.* 713).
- § 28. Sometimes the wording is so loose that it is doubtful if the instrument contains any promise.
- § 29. *The Policy.* It is universal custom to embody the terms of the contract in a policy, specifying the names of the parties, the premium, risk, time, subject-matter, conditions, and limitations.
- § 29 A. *What is part of the Policy.* The application, if in writing, is made a part of the policy by reference to it as such in the policy, if there is no statute to the contrary. (See also §§ 29, 29 C, 31.) Indorsements and marginal notes are part of the policy, or not, according to the justice of the case and the proper evidence of the intent of the parties.
- § 29 B. Parol transactions prior to or contemporaneous with the policy and not referred to in it as part of it are superseded by it, and avail only to make a case of misrepresentation (see also § 29 C.), reformation, or non-delivery. Prospectus.
- § 29 C. Statutes sometimes require *annexation* of the application to the policy.

3. KINDS OF POLICIES.

- § 30. Valued and open (see also §§ 31, 32); wager and interest (§ 33); time and voyage (§ 34).
- § 31. Sometimes not easy to determine whether a policy is valued or not. A valuation in the application referred to in the policy is sufficient. The contract is not less a valued one because the rule fixed on by the parties admits of variation day by day.
- § 31 A. Statutes declaring that policies on real estate shall be deemed valued policies in case of total loss.
- § 32. The same policy may be open as to one article and valued as to another.

- § 33. Wager and interest policies (see § 74).
 § 34. Time and voyage policies.

4. PARTIES AND THEIR DISABILITIES. (See also next chapter.)

- § 35. Private parties able to contract generally, and corporations established for the purpose may be parties to the contract of insurance.
 § 35 A. Infants. Unlicensed merchants. Parties joining.

§ 14. **Contract may be by Parol.** — However great may be the inconvenience to the parties, and however injudicious it may be to leave the terms of the contract to the uncertainties of even the most accurate and retentive memory, it seems, nevertheless, that a contract of insurance, the terms of which are not in writing, is sufficient to bind the parties, when there is no statute law to the contrary. (a)

A learned writer,¹ indeed, doubts whether an action upon a contract merely oral would be now sustained, since the usage of written contracts has become so ancient and so universal that it may be considered to have acquired the force of law. And this view seems to have been adopted to its full extent by the Supreme Court of Ohio,² as well upon the ground of (what was said to be) universal commercial usage and the authority of the books, as upon the ground that the charter required the policy to be in writing, — the question being whether a policy, which had become void by the sale

¹ 1 Duer, Ins. 60.

² Cockerill v. Cincinnati Mut. Ins. Co., 16 Ohio, 148. See § 18.

(a) *Brown v. Franklin Mut. F. Ins. Co.*, 165 Mass. 565; *Stehlick v. Milwaukee Mechanics' Ins. Co.*, 87 Wis. 322; *Hicks v. British Am. Ins. Co.*, 43 N. Y. S. 623; *Phoenix Ins. Co. v. Ireland* (Kans. App.), 58 Pac. 1024; *Fidelity & Cas. Ins. Co. v. Ballard* (Ky.), 23 Ins. L. J. 227. In order that a contract of insurance may bind the parties, all the essential elements of the contract must be agreed upon; but, when it is impossible at the time to obtain important facts affecting the subject of their dealings, the parties may make a general agreement to accomplish their purpose as well as they can. *Scammell v. China Mutual Ins. Co.*, 164 Mass. 341. An oral agreement to insure for a longer period than that stated in the contract will not be enforced in the absence of a consideration; and if the intention is to contract in writing upon payment of the premium, negotiations for insurance do not constitute a contract. *New York L. Ins. Co. v. McMaster*, 87 Fed. Rep. 63; 90 id. 40. See *Bankers' Acc. Ins. Co. v. Rogers*, 73 Minn. 12. Parol insurance with an authorized agent is valid and becomes at once effective when there is no definite agreement as to date. *Potter v. Phenix Ins. Co.*, 63 Fed. Rep. 382; *Hardwick v. State Ins. Co.*, 20 Oregon, 547, 551.

of the property insured, could be revived by a parol agreement. But upon neither ground is the decision supported by the authorities. Indeed, it seems to be no longer an authority in Ohio itself.¹

§ 15. **Special Provisions of Charter as to Form.** — It is doubtless generally true that a corporation cannot by its own act enlarge its own capacities, powers, or rights; but it would be strange to say that it cannot thus voluntarily incur *liabilities*. If a corporation by a corporate act appoints an agent under any name or title whatever, for the purpose of making, in its own behalf, any contract which it has a right to make, can the corporation itself impeach such a contract, made in its name by that agent, by alleging its own want of power to make such an appointment, or to contract by such an agent? Such a doctrine is in violation of all principle.²

Even an express provision in the act of incorporation that policies subscribed by the president and countersigned by the secretary, or however else, shall be binding on the corporation, merely specifies one sufficient mode of making the contract, and affords no just inference that this mode is exclusive of others, or that contracts not in writing are invalid.³

¹ *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345. This case holds that the provisions of a charter requiring "all policies and contracts" for insurance to be signed by the president does not have reference to intermediary contracts for policies, but only to the final contract or policy.

² *Bulkley v. The Derby Fishing Co.*, 2 Conn. 252, 254. And see also *Fuller v. Boston Mut. Fire Ins. Co.*, 4 Met. (Mass.) 206; *State Board of Agriculture v. R. R. Co.*, 47 Ind. 407; *Angell on Corp.* (10th ed.) 243; *National Bank v. Graham*, 100 U. S. 699; *New England Fire & Mar. Ins. Co. v. Schettler*, 38 Ill. 166.

³ *Trustees of First Baptist Church in Brooklyn v. Brooklyn Fire Ins. Co.*, 19 N. Y. (5 Smith) 305; *Constant v. The Alleghany Ins. Co.*, 3 Wall. (U. S. C. C.) 313; s. c. Am. Law Reg. N. S. 1, 116. See also *New England Mut. Ins. Co. v. De Wolf*, 8 Pick. (Mass.) 56, 62; *City of Davenport v. Peoria Mar. & Fire Ins. Co.*, 17 Iowa, 276; *Franklin F. Ins. Co. v. Colt*, 20 Wall. (U. S.) 560; s. c. 4 Ins. L. J. 367 and note, which holds that an agent may, after loss, fill upon demand a policy in accordance with the agent's parol agreement; *New England Fire & Mar. Ins. Co. v. Schettler*, 38 Ill. 166; *Security Fire Ins. Co. v. Kentucky Mar. & Fire Ins. Co.*, 7 Bush (Ky.), 81; *Hening v. United States Ins. Co.*, 2 Dillon, C. Ct. 26, denying s. c. 47 Mo. 430; *post*, §§ 16, 23. But see *contra*, *post*, § 63. That the current of foreign authorities is in the same direction, see *post*, §§ 20, 21. In Lower Canada it has been held that the mode specified in

§ 16. The ancient stringency of the common law required that corporations should execute their contracts under their corporate seal, and held, that they could only thus contract. But this doctrine is now exploded.¹ (a) The statutory provisions referred to would seem to intend rather to give to the modern doctrine the force of legislative sanction, than to preclude the corporation from the right to contract under the corporate seal, if they please, or to designate any particular mode which alone shall be binding upon them.² (s) The insured is also thereby relieved from the necessity of proving affirmatively that the particular officers are clothed with power which authorizes them to contract for the corporation.³

§ 17. And such, no doubt, is the spirit of the later English cases. In *Prince of Wales Life and Educational Assurance Company v. Harding*,⁴ which was a case where the charter provided that the seal of the company should not be affixed to policies except by the written order of three direc-

the charter is exclusive. *Montreal Ins. Co. v. McGillivray*, 9 L. C. 488, reversing s. c. 8 id. 401; while in Upper Canada it was held that, although under a clause in the charter which provided that "any policy signed by the president and countersigned by the secretary, but not otherwise, shall be deemed valid and binding on the company," a policy issued without the signatures was invalid, and the company would not be liable in a suit upon such a policy, yet they could be compelled to execute a valid policy as of the date when this invalid policy was issued. *Perry v. Newcastle Dist. Mut. Fire Ins. Co.*, 8 U. C. (Q. B.) 363. See also *post*, § 23 *et seq.*

¹ 2 Kent's Com. 288; *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Barr (Pa.), 339; s. c. 10 Law Reporter, 448; *Copper Miners v. Fox*, 3 Eng. Law & Eq. 420.

² [When the charter of a company provides that all policies shall be under seal, a policy not under seal cannot be produced as evidence in a suit by the company to recover the premium on it. *Lindauer v. Delaware Mut. Safety Ins. Co.*, 13 Ark. 461, 470.]

³ *Safford v. Wyckoff*, 4 Hill, 442, 446, Walworth, Ch.

⁴ 1 E., B. & E. 183.

(a) In England it was early held that a policy of insurance is not a specialty. 2 Saund. 202 a, n. (15). Policies not declared on as sealed instruments, and merely reciting that they were signed and delivered by the officers, will not be treated as specialties simply because they have, in place of

the insurer's corporate seal, an emblem or symbol printed there by the printer. *Met'n L. Ins. Co. v. Anderson*, 79 Md. 375, 379. In Massachusetts the facsimile of a seal printed on a blank policy form does not make the policy a sealed instrument. *McCarthy v. Met'n L. Ins. Co.*, 162 Mass. 254.

tors, a policy issued under seal, but without any order of the directors, was held to be valid and binding upon the company, for reasons substantially the same as those given in the American decisions. The object of the legislature was said to be to impose upon the directors the duty towards them of observing certain formalities, for the better protection of the stockholders. If they failed in that duty, they would be liable for their negligence to the stockholders, but the absence of the prescribed formality would not render the contract void as against the company.¹ So, where the policy is by the charter required to be under seal, a policy issued without a seal may be construed as an interim receipt.² An indorsement not under seal on a policy under seal is a new contract.³

§ 18. But corporations are not the only underwriters. Private individuals may insure; and if a party, for a good consideration, should take upon himself the risk of theft upon a quantity of specie in its passage from one port to another, and it should be stolen, a court of justice would doubtless hesitate long before it would sustain the defendant's refusal to indemnify, on the ground that the contract was merely oral, against the irresistible equity of the plaintiff's claim. Usage, it is said, requires it. But, aside from the fact that usage may be waived by the consent of parties, its requisitions cannot be said to be so inexorable as virtually to import a new clause into the Statute of Frauds.⁴

§ 19. It is not denied that by the principles of the com-

¹ See also *Collett v. Morrison*, 9 Hare, 162.

² *Wright v. London Life Ass. Co.*, *Wright v. Sun Mut. Life Ins. Co.*, 29 U. C. (C. P.) 221, carried to the Supreme Court on appeal.

³ *Shertzer v. Mut. Fire Ins. Co.*, 46 Md. 506; s. c. 8 Ins. L. J. 72.

⁴ Even the Supreme Court of Ohio, although it has several times referred to the case of *Cockerill v. Cincinnati Mut. Ins. Co.*, 16 Ohio, 148, with apparent approval, has, in a later case (*Palm v. Medina Ins. Co.*, 20 Ohio, 529), apparently taken it for granted that a contract to insure need not be in writing. See also *ante*, § 15 n. A contract for parol insurance for a year, or from year to year, is not within the Statutes of Frauds. *Walker v. Metropolitan Ins. Co.*, 56 Me. 371; *Trustees of First Baptist Church in Brooklyn v. Brooklyn Fire Ins. Co.*, 19 N. Y. (5 Smith) 305, 308; *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.), 448; *Fish v. Cottenet*, 5 Hand. (N. Y.) 538; *Security Fire Ins. Co. v. Kentucky Mar. & Fire Ins. Co.*, 7 Bush (Ky.), 81.

mon law a verbal agreement would be sufficient; and it seems difficult to see why a party, in the absence of any statutory regulations to the contrary, may not be heard in a court which administers the law to which he appeals, and which can find nothing in its principles adverse to his claim. It was accordingly said, in *McCulloch v. The Eagle Insurance Company*,¹ to be certain that if a contract be made, the mere want of a policy will not prevent the plaintiff from recovering. And more recently, Mr. Chancellor Walworth, after remarking that the Stamp Laws in England, and the respective Codes of France and Spain, require that the contract be in writing, observed,² that the assertion of Millar³ that the importance of the contract of insurance, and the singularity of those obligations which it is intended to create, have in all commercial countries rendered a deed in writing essential to its validity, is unsupported by authority, and that he has been unable to find anything in the common law which requires the contract to be in writing, though the term "policy" undoubtedly imported a written instrument.

§ 20. Nor even in France, although the *Code de Commerce* requires that the contract be reduced to writing, would a verbal agreement be *ipso facto* null and void. Any written evidence that an agreement has been made will let in the plaintiff to show what the contract is; and even this is not necessary unless the defendant deny that there ever was any agreement of any kind.⁴ And if he do deny, the better opinion is that he may be put upon his oath;⁵ which, however, Emerigon does not admit.⁶

¹ 1 Pick. (Mass.) 278.

² *Sandford v. Trust Fire Ins. Co.*, 11 Paige (N. Y.), 547. See also *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Barr (Pa.), 339, s. c. 10 Law Reporter, 498, where Gibson, C. J., said that a few years before a case was tried before him on a parol agreement, and though the case was defended by one of the soundest lawyers at the Philadelphia bar, the point that the contract should be in writing was not made. As to the effect of the Stamp Laws, see *post*, § 25.

³ *Ins.* 30.

⁴ Rogron, *Code de Commerce Expliqué*, art. 332, note; Alauzet, *Traité Gén. des Assurances*, 181, 401, who cites Potier, Merlin, and others.

⁵ *Ibid.*

⁶ *Traité des Assurances*, c. 2, § 1. In Holland the doctrines of fire, marine, and other insurance have been incorporated into the Commercial Code. The

“Writing cannot be regarded,” says Alauzet,¹ “as necessary to the validity of the contract of insurance.” “This form,” says Pothier, “is absolutely foreign to the substance of the contract.” And Merlin afterwards held it to be clear that writing was only necessary to establish the existence of the contract against those who would deny it. The law, in truth, cannot change the essence of a contract which it has not created, and which exists independently of it, because it is of the law of nations. But it is entirely competent to our law to regulate the conditions necessary to the proof of the contract; and under this relation it becomes a contract subject thereto. To say, however, that insurance itself shall have no existence except under these conditions, and that one of the parties may admit all the allegations of the other, and yet refuse to comply with the terms of the contract because it is not in writing, would be to establish an abuse against truth and the nature of things. The *Code de Commerce* is far from containing any such provision; and always when it has made any requirement on pain of nullity, it has expressly said so. It is well known what chaos has been introduced into another branch of the law by the technical distinction between forms which are substantial and those which are not; between those prescribed on pain of nullity and those which are only directory. Nothing of the like exists in commercial law. If the Code does not pronounce nullity expressly, clearly, and in a peremptory manner, it cannot be invoked. In such cases equivalents may be substituted for its prescriptions.

§ 21. It was said, in the Trustees of the First Baptist

twelfth article of Title 9, the 257th of the Code, is as follows: “The contract of insurance subsists as soon as the agreement has been determined between the parties, and the reciprocal rights and obligations of the insurers and the insured commence from that moment, even before the signature of the policy. The contract imports the obligation of the insurers to sign the policy within the time agreed upon and deliver it to the insured.” Rogron, *Code de Commerce Expliqué*, p. 245. Le Guidon, art. 11, c. 1, speaks of parol agreements to insure, and prohibits them.

¹ *Ubi supra*. The whole subject is discussed with great ability, and all the learning up to that time, in *Montreal Ins. Co. v. McGillivray*, 9 L. C. (Q. B.) 488, reversing s. c. 8 id. 401.

Society in *Brooklyn v. Brooklyn Fire Insurance Company*, that an agreement that an existing policy for a year should be in existence from year to year after its expiration may be by parol, and yet be valid, as the reasons which require policies to be in writing do not apply to such an agreement.¹ (a) What these reasons are do not appear in the opinion of the court, and it may well be doubted if any distinction like that so intimated does in fact exist. And the New York Court of Appeals,² although the case before it was rather one of the renewal of a contract, the terms of which were fixed in writing, than the making of a new one, has recently broadly asserted, that "to deny that parol agreements to insure are valid would be simply to affirm the incapacity of parties to contract, when no such incapacity exists according to any known rule of reason or of law."

¹ 18 Barb. (N. Y.) 69.

² *Trustees of the First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305.

(a) An existing policy may also be renewed by parol. *Springer v. Anglo-Nevada Ass. Corp.*, 11 N. Y. S. 533; *Scott v. Home Ins. Co.*, 53 Wis. 238; *McCabe v. Aetna Ins. Co.* (No. Dak.), 81 N. W. T. 26; *Baldwin v. Phoenix Ins. Co.* (Ky.), 54 S. W. 13; *Western Ass. Co. v. McAlpin* (Ind. App.), 55 N. E. 119. In an oral contract "to renew his insurance for one year," by force of the term "renew," "the company, as well as the property to be insured, and the terms of the policy, were sufficiently designated." *Abel v. Phoenix Ins. Co.*, 62 N. Y. S. 218. A parol agreement, terminable at any time upon notice to either party, that a fire insurance policy shall be renewed from year to year, is not within the statute of frauds. *Phoenix Ins. Co. v. Ireland* (Kans. App.), 58 Pac. 1024. In England it has recently been held that an accident policy which provides for the payment of a premium for one year, and which is capable of renewal only by the insurer's consent, is not a continuing policy for all purposes, but, upon each renewal, there is a new contract year by year. *Stokell*

v. Heywood, 74 L. T. 781. In this country it has been held that a policy of life insurance providing for the payment of annual premiums by the assured is not a contract for one year, with the privilege of renewal from year to year by the payment of the premiums, but a contract for the life of the assured, subject to forfeiture and termination for non-performance of its conditions; and it is incumbent on the party pleading such forfeiture to clearly establish the defence. *McMaster v. New York L. Ins. Co.*, 90 Fed. Rep. 40. See *Klein v. Liverpool, &c. Ins. Co.* (Ky.), 57 S. W. 250. A lapsed policy is not revived, if a warranty contained in the application for revival is untrue. *Bottomley v. Met'n L. Ins. Co.*, 170 Mass. 274. See *Burson v. Phila. Fire Ass'n*, 136 Penn. St. 267.

A new substituted policy which is void for non-compliance with a statute cannot be validated by relying upon the preliminary oral agreement, which is presumed to be similar thereto. *Green v. Liverpool, &c. Ins. Co.*, 91 Iowa, 615.

The distinction above referred to, suggested by the court below in the same case, seems to have been disregarded.

§ 22. The cases already cited are strictly cases of agreements looking to the issue of a policy; and most of the terms of the several agreements are in some form in writing. But the case of the Mobile Marine Dock and Mutual Insurance Company¹ was less embarrassed by written evidence of any kind. In this case there was a simple memorandum in figures,² alleged to be in the handwriting of the secretary of the insurance company, and the offer was to show by this and oral evidence that a contract of insurance against fire was made between the parties. The insurers objected that both the memorandum and the oral evidence were inadmissible, on the ground that it was not competent by parol evidence to establish a contract of insurance. But the court held that an oral agreement for insurance against loss on goods by fire was valid.

§ 22 A. A parol agreement may be made by an agent, and takes effect forthwith, although entered into contemporaneously with an agreement by the insurers to deliver, and the insured to accept and pay for, as a substitute therefor, a policy in writing in the usual form, and remains in force till the delivery or tender of such policy. Until then the condition usually inserted in such policies, making prepayment of the premium necessary to the validity of the contract, has been held to have no operation by implication.³ Nor will a mere demand of the premium, without a tender of the policy, relieve the insurers from responsibility under such parol agreement;⁴ and under it the insured may recover, although he may have received a policy, in pursuance of the agreement, if by its terms such policy becomes valid only on

¹ 31 Ala. 711.

² This memorandum was as follows:—

“5250	. . .	7 d'ys	. . .	1-8	. . .	6.56
4650	. . .	2 “	. . .	1-20	. . .	2.32
9900. 3-16 to N. O.						18.56 — \$27.44.”

³ Kelly v. Com. Ins. Co., 10 Bosw. (N. Y.) 82; Dayton Ins. Co. v. Kelly, 24 Ohio St. 345. See also *post*, §§ 23, 44, 340.

⁴ Kelly v. Com. Ins. Co., *supra*.

being countersigned by the agent, and in fact has not been so countersigned.¹ [If no policy is executed a suit can be maintained on the memorandum.² A parol contract of insurance is good though nothing is said about the premium, where the parties have dealt together for several years and know the rate of premium, and the agents have been in the habit of giving the plaintiff credit for the premium.³] And the rule of damages is the same as under a written policy.⁴ But if a policy has once been delivered which proves to be invalid by the fault of the insured, he cannot disregard that, and fall back upon the verbal agreement.⁵

§ 23. In the case of *Sanborn et al. v. Fireman's Insurance Company*,⁶ the point was again distinctly made that the contract of insurance is required to be in writing, and that a suit at law is not maintainable on an oral agreement. After elaborate consideration, in which all the authorities were reviewed, the conclusion to which the court arrived was, that no principle of the common law requires that this contract, any more than any other simple contract, made by competent persons upon a sufficient consideration, should be evidenced by a writing. And the oral agreement was upheld, although the charter of the defendant company provided that they should have a right to make contracts by the signature of the president for the time being, or by the

¹ *Kelly v. Com. Ins. Co.*, *supra*.

² [*State F. & M. Ins. Co. v. Porter*, 3 Grant's Cas. 123.]

³ [*Boice v. Thames, &c. Marine Ins. Co.*, 38 Hun, 246.]

⁴ *Rockwell v. Hartford Fire Ins. Co.*, 4 Abb. Pr. Rep. (N. Y.) 179; *Ins. Co. v. Ins. Co.*, 19 How. (U. S.) 318; *Ellis v. Ins. Co.*, 50 N. Y. 402. In *Ela v. French*, 11 N. H. 356, an action against a consignee on a parol agreement to insure certain books, without any agreement as to the amount, was sustained, the rule of damages being the value of the books, on the presumption that the insurance was to be for that value.

⁵ *Merchants' Mut. Ins. Co. v. Lyman*, 15 Wall. (U. S.) 664.

⁶ 16 Gray (Mass.), 448, decided in 1860, but not published till 1871. Approved and followed in *Relief Fire Ins. Co. v. Shaw*, 4 Otto (U. S.), 574. See also, to the same point, *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143; *Humphrey v. Hartford Fire Ins. Co.*, Dist. Ct., 9 Repr. 106; *Alabama Gold Life Ins. Co. v. Mayes* (Ala.), 9 Repr. 75; *Taylor v. Germania Ins. Co.*, 2 Dill. C. Ct. 282; *Baubie v. Aetna Ins. Co.*, id. 156; *Hartford Fire Ins. Co. v. Farrish*, 73 Ill. 166; *Franklin Fire Ins. Co. v. Taylor*, 52 Miss. 441; *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435.

signatures of such other persons, and in such form and with such ceremonies of authentication as they may by their rules and by-laws direct, the court regarding this provision of their charter as merely enabling, and not restrictive of the general power to effect contracts in any other lawful and convenient mode, — a view which must now be considered as the well-settled doctrine by the nearly universal concurrence of the authorities. The distinction between a contract to insure or to issue a policy of insurance, and the policy itself, is obvious, and constantly recognized by the courts. The former may be by parol or in any form. The latter may be regulated and controlled by statutes or by the by-laws of the company issuing it.¹ The terms of the agreement for a policy not specified are presumed to be those of the ordinary policies issued by the same insurers on similar risks.² It is obvious, however, that conditions as to indorsement cannot be complied with. In such cases notice will be sufficient.³ And perhaps not even that is necessary, as the contract may be one for a policy upon which shall be made the indorsements and the notices required by the conditions.⁴

¹ *Rhodes v. Railway Passenger Ins. Co.*, 5 Lans. (N. Y.), 71; *Walker v. Metropolitan Ins. Co.*, 56 Me. 371; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Kennebec Co. v. Augusta Ins. & Banking Co.*, 6 Gray (Mass.), 204; *Baxter v. Massasoit Ins. Co.*, 13 Allen (Mass.), 320; *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216; *Western Massachusetts Ins. Co. v. Duffey*, 2 Kan. 347; *Union Mut. Ins. Co. v. Commercial Mut. Mar. Ins. Co.*, 2 Curtis, C. Ct. 524; s. c. affirmed in the United States Supreme Court, 19 How. 318; *Security Fire Ins. Co. v. Kentucky Mar. & Fire Ins. Co.*, 7 Bush (Ky.), 81; *Hartford Ins. Co. v. Wilcox*, 57 Ill. 180; *Insurance Co. v. Colt*, 20 Wall. (U. S.) 560; *ante*, § 15; *Putnam v. Home Ins. Co.*, 123 Mass. 324, 328.

² *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256; *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325; *Oliver v. Mut. Com. Mar. Ins. Co.*, 2 Curtis, C. Ct. 277; *Fuller v. Madison Ins. Co.*, 36 Wis. 509; (F. P.) *Barre v. Council Bluffs Ins. Co.*, 76 Ia. 609; *Smith v. State Ins. Co.*, 64 Ia. 716. A company will be presumed to intend to issue its customary kind of policy in the absence of any averment and proof to the contrary. *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594, 602. But although the conditions of an oral contract upon which a policy is to be issued are *prima facie* those of the ordinary policy applicable to the case, parol evidence is admissible to show any particular condition that was agreed on. *Salisbury v. Hekla F. Ins. Co.*, 32 Minn. 458.

³ *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256; *McQueen v. Phoenix Mut. Ins. Co.*, Sup. Ct. Canada, 3 Legal News, 336; *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594.

⁴ *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345. See also *ante*, § 22.

[§ 23 A. *Recent decisions* are to the same effect as those of earlier date. There can be no doubt in this country of the validity of a parol contract of insurance,¹ and it may be enforced specifically, or by action for its breach.² A valid parol insurance may be made in a mutual company formed under the New York laws of 1857, ch. 739. The company may bind itself by parol to issue a policy, and will have to pay a loss occurring before the actual issue.³]

[§ 23 B. When it is doubtful from the evidence whether an agent of an insurance company and the plaintiff had entered into a parol agreement of insurance or a parol agreement for the issue of a written policy, evidence should be admitted of the custom of other insurance companies as to matters of this kind.⁴ The facts may show that the parol agreement was not a contract of insurance but merely an agreement on the part of the agent that he would insure the property and keep it insured for the plaintiff. In such case the matter lies entirely between the plaintiff and the agent personally.⁵]

[§ 23 C. *The Statute of Frauds* does not make a writing necessary to insurance.⁶ It has been held that a parol contract to insure for three years or more is not within the Statute of Frauds, for the contingency *may* happen and the contract end within a year.⁷ (a) And in another case a

¹ [Commercial Union Ass. Co. v. State, 113 Ind. 331; Lingenfelter v. Phoenix Ins. Co., 19 Mo. App. 252; Phoenix Ins. Co. v. Spiers, 87 Ky. 286; People's Ins. Co. v. Paddon, 8 Brad. 447; Home Ins. Co. v. Adler, 71 Ala. 516; Trustees, &c. v. Brooklyn F. Ins. Co., 19 N. Y. 305, 307; N. W. Iron Co. v. Ætna Ins. Co., 23 Wis. 160.]

² [Gold v. Sun Ins. Co., 73 Cal. 216.]

³ [Van Loan v. Farmers' Mut. F. Ins. Ass'n, 90 N. Y. 280.] -

⁴ [Ætna Ins. Co. v. N. W. Iron Co., 21 Wis. 464, 471.]

⁵ [Sargent v. National F. Ins. Co., 86 N. Y. 626.]

⁶ [Phoenix Ins. Co. v. Spiers, 87 Ky. 286.]

⁷ [Wiebeler v. Milwaukee Mechanics' Mut. Ins. Co., 30 Minn. 464.]

(a) A contract to insure need not be in writing: Emery v. Boston Marine Ins. Co., 138 Mass. 398; and when it may be completely performed within a year upon the happening of a contingency, it is not within the statute of frauds. Browne, St. of Frauds, § 275; Franklin Ins. Co. v. Colt, 20 Wall. 560; Sanford v. Orient Ins. Co., 174 Mass. 416, 420; Commercial F. Ins. Co. v. Morris, 105 Ala. 498; Croft v. Hanover F. Ins. Co., 40 W. Va. 508; Howard Ins. Co. v. Owen, 94 Ky. 197. Upon such contract to insure, there

parol agreement for insurance was held not void under the Statute of Frauds, even though the applicant expected a five years' policy.¹ A verbal agreement to insure goods, not only against fire, but against other perils within the Statute of Frauds, is valid as to the former and void as to the latter.²

[§ 23 D. *On Principle* it would seem that at common law there could be no objection to an oral contract to make an insurance in future; or to issue a policy at a time named or within a reasonable time, holding the applicant insured meanwhile (this is the usual agreement); or to insure *now*, making the full contract by parol, without any expectation of a policy. So far the law is clear when the contracting parties are natural persons, and there is no statute in the way. But when a *corporation* makes the contract, or a statute enters the question, the problem is not so simple. Unless prevented by the charter a company may make valid oral insurance "policies."³ But we may ask, may not the prevention be by implied exclusion as well as by express prohibition? And will a positive prohibition make the contract void as between the parties, or only lay the company open to forfeiture for the violation of the law under which it exists? Corporations are creatures of limited powers, and if the charter of an insurance company gives it the power to issue *policies of insurance*, it is a serious question whether a parol contract of insurance, intended to be final without any looking forward to a policy, would be good. It is clear that a provision in the charter of a company requiring all contracts of insurance to be in writing, does not apply to the preliminary contracts to make insurance, and these, although in parol, will be specifically enforced even after loss.⁴ In such cases it is very proper to hold the contract good. It is

¹ [Van Loan v. Farmers' Mut. F. Ins. Ass'n, 24 Hun, 132.]

² [Mobile, &c. Ins. Co. v. McMillan, 31 Ala. 711.]

³ [Henning v. United States Ins. Co., 47 Mo. 425.]

⁴ [Phoenix Ins. Co. v. Ryland, 69 Md. 437.]

being no evidence what the terms of ordinarily issued by the company. the policy would be, the policy con- Sproul v. Western Ass. Co., 33 Ore- templated is presumed to be the policy gon, 93.

incidental to the conferred power of issuing policies; but when there is no agreement contemplating the issue of a policy, the parol contract being meant as a finality, there is no pretence of conforming to the power. If the charter or statute provision is actually known to the person dealing with the company, he should not be allowed to say that the contract is good. If he acts without such knowledge, it has been held that even where a statute *requires* a contract to be in writing, equity will relieve if the person complaining has acted on a parol agreement, so that it would be a fraud on him to permit the other to take advantage of the statute.¹ In another case it was held that a mere parol promise, which does not involve the execution of a policy, is not within the general authority of an officer or agent, and cannot be enforced.² The company of course cannot be heard to say that it did not know its own charter.

In all cases of the kind we are discussing, the first question is whether the organic law of the company gives the right to make parol contracts, and if not, the question is whether the parol contract, although *ultra vires*, is not after all sustainable. The general principles of the matter are these: (1) The legislative intent governs so far as it can be determined.³ If it is expressed or clearly implied that when the law is not conformed to, the consequences shall fall upon the company alone, and the contract shall be good in favor of third persons, the company cannot plead *ultra vires*. If the law expressly declares the contract void it will be so held. Subject to this rule of legislative intent, or rather as aids to determine it where it is otherwise doubtful, the following principles are invoked. (2) One who has received and retained the benefit of a transaction will not be per-

¹ [Simonton, &c. v. Liverpool, &c. Ins. Co., 51 Ga. 76, 81.]

² [Constant v. Insurance Co., 3 Wall. 313 (Pa.), 1881; 1 Am. L. Reg. N. S. 116.]

³ [Wyman v. Bank, 29 Fed. Rep. 734; Gold Mining Co. v. National Bank, 96 U. S. 640. Sometimes holding a contract void because not made according to charter would punish the very persons the legislature meant to protect. Roberts v. Lane, 64 Me. 108; Farmington Bank v. Fall, 71 Me. 49. If a penalty is provided in the statute, that is often deemed sufficient to show that the legislature meant to confine the effects of its violation to the specified consequence. Farmers' & Mechanics' Bank v. Dearing, 91 U. S. 29]

mitted to plead *ultra vires in his own behalf*.¹ (3) The plea will not be allowed as against one innocently giving value in good faith without knowing that the contract was *ultra vires*.² And under this rule it is a question whether the general public is to be held to know the provisions of the corporate charter. My own opinion favors the negative.³ The presumption of knowledge of the law should not be stretched beyond the bounds of common sense, and the reason behind it. Business men of prudence continually deal with corporations without examining their charters, and the certainty of business transactions would be greatly impaired by subjecting their validity to the provisions of charters and statutes made for the government of the company, and which could not be known by the business world in general without the expenditure of an immense amount of time, thus hampering commerce. Suppose one buying a railroad ticket had to examine the company's charter to find out that it was not acting *ultra vires*, in order to be sure he could recover in case of accident or breach of contract! What a mess things would be in!⁴ If a man in dealing with a company does all that men of ordinary prudence do under like circumstances, he should be treated as innocent and allowed to recover on his policy. If, however, he actually knows his contract is in violation of law, or fails of due prudence, which, if exercised, would have led him to such knowledge, then the law should not protect its own violation, and he must not be allowed to *sue on his contract*, but only be refunded his premiums at the most.

Where a substantial effort is made to conform to the law, an *informality* ought not to vitiate the policy unless such is

¹ [Parish v. Wheeler, 22 N. Y. 494; Norton v. Bank, 61 N. H. 592 and cases cited; National Bank v. Whitney, 103 U. S. 99; Bank v. Bank, 9 Heisk. 408; Little v. O'Brien, 9 Mass. 426; Union National Bank v. Mathews, 98 U. S. 621; Chester Glass Co. v. Dewey, 16 Mass. 94; Allen v. Freedman's S. & T. Co., 14 Fla. 418.]

² [Credit Co. v. Howe Machine Co., 54 Conn. 387-389.]

³ [Lloyd v. West Branch Bank, 15 Pa. St. 172. Individuals cannot be expected to carry in their pockets the charters of all the corporations they deal with.]

⁴ [Bissell v. Michigan Southern Railroad Co., 22 N. Y. 258.]

clearly the intention of the legislature. A mere technical non-compliance with a statute by the assured through failure to insert "names and style" of all persons interested, will not avoid the policy.^{1]}

§ 24. **Subsequent Modification by Parol.** — The certificate of the secretary of an insurance company given to a policyholder, setting forth the consent of the directors that the policy already issued shall cover property not originally embraced by the policy, is evidence of a contract of insurance upon the property mentioned in the certificate;² unless by charter, or by law, such consent is restricted to specific persons.³

And for reasons already stated in considering the question of the validity of parol contracts of insurance, there seems to be no doubt that a verbal agreement to extend the terms of an existing policy, so that it shall cover property not originally within the scope of the contract, or otherwise modify the terms, would be valid.⁴

[§ 24 A. *Subsequent oral Change of a Policy, continued.* — A new and distinct oral agreement on sufficient consideration may modify the policy in any desired manner.⁵ Policies are not required by law to be in writing, and outside the Statute of Frauds there is no rule preventing the change of a written contract by parol.⁶ A contract of insurance is not within the Statute of Frauds, and although in writing it may be changed by parol, though the policy says it shall only be changed by writing.⁷ The authority of the agents of the company to make such subsequent oral agreements may be inferred from the course of dealing with the insured and the recognition of such acts by the company.⁸ Even

¹ [Wolff v. Horncastle, 1 B. & P. 319, 323.]

² Goodall v. New England Fire Ins. Co., 5 Foster (N. H.), 169.

³ Stark County Mut. Ins. Co. v. Hurd, 19 Ohio, 149. But see *post*, §§ 369, 370.

⁴ Wood v. Rutland & Addison Mut. Fire Ins. Co., 31 Vt. (2 Shaw) 552; Westchester Fire Ins. Co. v. Earle, 33 Mich. 143.

⁵ [Willcuts v. Northwestern Mut. L. Ins. Co., 81 Ind. 300; Cummings v. Arnold, 3 Met. (Mass.) 486, 489; Bunce v. Beck, 43 Mo. 266, 280.]

⁶ [Roger Williams Ins. Co. v. Carrington, 43 Mich. 252.]

⁷ [Phoenix Ins. Co. v. Spiers, 87 Ky. 286.]

⁸ [Day v. Mechanic' & Traders' Ins. Co., 88 Mo. 325.]

though the contract is under seal the strict performance of the instrument may be waived by parol.¹ Evidence of a subsequent oral agreement altering the written policy, consented to and acted upon by both parties, is not admissible to avoid a variance in a written policy declared upon. A subsequent oral agreement on sufficient consideration is good, but it must be distinctly set forth in the declaration.^{2]}

§ 25. **Parol Contracts in England.** — Whether it would not be too much to say that, in England, a parol agreement for insurance would be void, may at least be doubted.³ In *Morgan v. Mather*,⁴ it was indeed held that a contract of insurance, not in writing, would be void as an evasion of the stamp-duty. But cases may be easily conceived where no such evasion is intended; as, for instance, a verbal agreement upon the terms, and a loss before the terms agreed upon are committed to writing, with a refusal on the part of the insurer to execute and deliver the policy. The stamp laws, moreover, do not go to the validity of the contract. They do not require any description of contract to be reduced to writing for the purpose of being stamped; they simply provide that, when expressed in writing, this paper, parchment, or vellum, upon which the contract is written, shall not be received in evidence, or have any legal force or validity, unless a stamp of a specific value and amount has been affixed to it.⁵ But it may happen, in a variety of cases, that the transaction is such that it may be proved by other evidence than the written instrument; and the objections arising from the stamp acts may be avoided by a resort to another species of proof.⁶ The doubt expressed in *Western Massachusetts Insurance Company v. Duffey*,⁷ as to whether the stamp act does not require that the contract

¹ [Dearborn v. Cross, 7 Cowen, 48, 50.]

² [Henning v. United States Ins. Co., 47 Mo. 425.]

³ *Salvin v. James*, 6 East, 571.

⁴ 2 Ves. Jr. 18.

⁵ Addison on Contracts, 119.

⁶ Comyn on Cont. pt. 1, c. 3, p. 45; Phillips on Evidence, c. 9; Chitty on Cont. 115.

⁷ 2 Kan. 347; *Fish v. Cottenet*, 5 Hand. (N. Y.) 538.

be in writing, seems not to be well founded. It may be here stated that the State courts do not recognize the constitutional right of the general government to determine the rules of evidence by which the former shall be governed, and hold, pretty uniformly, that the law of Congress declaring that no instrument shall be admitted or used as evidence in any court without being duly stamped applies only to the courts of the United States.¹ Whether it is within the power of Congress to declare unstamped contracts wholly void is a question of some doubt. That it is not has been declared in Illinois² and in Kentucky.³ But it is doubtful if this will become the settled view of the law upon mature consideration.⁴ It is also very generally held that under United States Statutes, 1864, c. 173, § 163, and 1865, c. 78, only those unstamped instruments can be said to be void where the stamp has been omitted with intent to defraud the revenue.⁵ And such is the law under the statute of 1866, c. 184, § 9.⁶

§ 26. The laxity and informality of a policy of insurance have been frequently the subject of judicial animadversion.

¹ *Carpenter v. Snelling*, 97 Mass. 452; *Hitchcock v. Sawyer*, 39 Vt. 412; *Dudley v. Wells*, 55 Me. 145; *McGovern v. Hoesback*, 53 Pa. St. 176, 177; *Griffin v. Ranney*, 35 Conn. 239; *Craig v. Dimock*, 47 Ill. 308; *Bunker v. Green*, 48 Ill. 243; *United States Express Co. v. Haines*, id. 248; *Twitchell v. Commonwealth*, 7 Wall. (U. S.) 321; *Green v. Holway*, 101 Mass. 243. *Contra*, in Pennsylvania, by a divided court, *Chartiers & Rob. Turnpike Co. v. McNamara*, 72 Pa. St. 228. See the cases collected and commented upon, 7 Alb. L. J. 49. In *Edeck v. Ranuer*, 2 Johns. (N. Y.) 423, and *Plessinger v. Depuy*, 25 Ind. 419, where unstamped instruments were excluded, the question of constitutional competency was not raised.

² *Latham v. Smith*, 45 Ill. 29.

³ *Hunter v. Cobb*, 1 Bush (Ky.), 239.

⁴ *License Tax Cases*, 5 Wall. (U. S.) 462; *Pervear v. Commonwealth*, id. 475; *Green v. Holway*, 101 Mass. 243.

⁵ *Tobey v. Chipman*, 13 Allen (Mass.), 123; *Willey v. Robinson*, id. 128; *Govern v. Littlefield*, id. 127; *Lynch v. Morse*, 97 Mass. 458; *Whitehill v. Shickle*, 43 Mo. 537; *Hallock v. Jaudin*, 34 Cal. 167; *Harper v. Clark*, 17 Ohio St. 190. See also cases in Maine, Vermont, and Pennsylvania, before cited in this section. *Contra*, *Hugus v. Strickler*, 19 Iowa, 413; *Miller v. Morrow*, 3 Coldw. (Tenn.) 557; *Maynard v. Johnson*, 2 Nev. 16; *Wayman v. Torreyson*, 4 id. 124, which hold that unstamped instruments, without such intent, are void.

⁶ *Green v. Holway*, 101 Mass. 243. This case contains a valuable summary of the stamp laws, and of the adjudications thereon.

"Courts of law," said Mr. Justice Buller,¹ "have always considered a policy of insurance as an absurd and incoherent instrument." "Policies of insurance," said Chief Justice Marshall,² "are generally the most informal instruments which are brought into courts of justice." But length of time and a multitude of judicial decisions, embracing almost every important word in the ancient though inaccurate form, have at length so settled the force and meaning of its different parts, that any serious attempt to alter or reconstruct with reference to greater certainty or symmetry would doubtless lead to new doubts and new litigation, and should, be admitted only after the most careful consideration.³ Lord Mansfield said he did not recollect an addition which had not created doubts upon its construction; and in this country it would seem that attempts to reform have been attended with no better success.⁴

§ 27. **The Form unessential.** — No particular form is absolutely necessary. A policy may be in the form of a bond, or in any other form, provided its scope and meaning import an insurance.⁵ Policies are sometimes executed both in this country and in England, under seal, though this practice is chiefly confined to companies of long standing, which can trace their existence back to the time when it was held that corporations could only contract in that manner. But policies are now common in England signed by three of the directors of the company, and with us it is the very general practice to provide, in acts of incorporation, that policies signed by the president and countersigned by the secretary shall be binding. And the signatures of *de facto* directors or officers will give effect to the policy in the hands of a stranger. He need not inquire into the regularity of their appointment.⁶ In fact, any person may engage in the busi-

¹ Brough v. Whitmore, 4 T. R. 206.

² Yeaton v. Fry, 5 Cranch, 335.

³ Per Ld. Mansfield, Simond v. Boydell, Doug. 268.

⁴ Phillips on Insurance, vol. i. c. 1, § 2.

⁵ Kent v. Bird, Cowp. 533; Puller v. Glover, 12 East, 124; Roebuck v. Hamerton, Cowp. 737.

⁶ County Life Ass. Co., *In re*, L. R. 5 Ch. App. 238.

ness of insurance, and his contracts relative thereto, whether in writing, or, as we have just seen, by parol, will be valid. [A parol contract, however, must have all the requisites of a written contract, viz.: subject-matter; the risks insured against; the amount insured; the duration of the risk, and the premium of insurance. A want of any one of these is fatal.¹ It is sufficient, however, if the items are fixed by a previous course of dealing; for example, a parol contract of insurance is good, though nothing is said about the premium, where the parties have dealt together for years, and know the rate of premium, and the agents have been in the habit of giving the plaintiff credit for the premium.²] It is well, though perhaps not necessary, when policies are under seal, and contracts by the parties thereto are made to vary or continue the original contract, that these also should be under seal, whether indorsed upon the back of the policy or not.³ If the indorsement be without seal, it may be a new contract, in which assumpsit will lie.⁴ If the policy under seal provides for its continuance from year to year, there is no new contract at the expiration of the year, and covenant must be brought.⁵ If the charter requires policies to be under seal, and a policy be issued and accepted by mutual mistake without a seal, the court will reform the contract.⁶ [A policy may be left blank and filled up by the insertion of "whom it may concern," or with the names of the parties for whom it was issued, where such a custom is shown.⁷]

A modern policy of fire insurance, it has been well said, is a very complicated contract. Before executing almost any other instrument of equal perplexity, the parties would

¹ [Tyler v. New Amsterdam Fire Ins. Co., 4 Robt. (N. Y.) 151, 155.]

² [Boice v. Thames, &c. Marine Ins. Co., 88 Hun, 246.]

³ Kaines v. Knightly, Skinner (Eng. folio), 54; Luciani v. Am. Fire Ins. Co., 2 Whart. (Pa.) 167; Head v. Prov. Ins. Co., 2 Cranch, 127; Robinson v. Tobin, 1 Stark. 336.

⁴ Shertzer v. Mut. Fire Ins. Co., 46 Md. 506; Frost v. Liverpool, &c. Ins. Co., 2 Hannay (N. B.), 278.

⁵ Baltimore Fire Ins. Co. v. McGowan, 16 Md. 47.

⁶ Wright v. Sun Mut. Ins. Co., 29 U. C. (C. P.) 221, carried to Supreme Court of Canada on appeal.

⁷ [Turner v. Burrows, 8 Wend. 144, 151.]

deem it necessary to take the advice of counsel. Questions frequently arise as to the proper construction of the terms used, which divide the opinions of the most learned jurists.¹ And it may be added that the indifference, not to say culpable negligence, of too confiding applicants, who often enter into contracts of this kind as they would into no others, without being aware, except in the most general way, of their terms and conditions, has produced, and is producing the most serious disappointments in the shape of litigation, always expensive and vexatious, and not unfrequently fruitless and disastrous. Yet such disappointments are but the natural results of a want of care and foresight; and by the exercise of these they may be, to a very great extent, avoided. No one is safe in accepting a policy, without the most careful examination of its contents.

§ 28. Policies have sometimes been so loosely worded as to leave it doubtful whether the obligatory clause imported a promise. In *Alchorne v. Saville*,² a question arose whether a clause in the policy declaring that "the trustees and directors of the company, whose names are hereunto subscribed, do *order*, *direct*, and *appoint* the directors for the time being of the said company to raise and pay," &c., was sufficient upon which to found an action of covenant; and it was held that the words imported merely an order to pay, by which neither the parties who executed the policy, nor those to whom it was directed, were bound. Where, however, it was *declared* by the policy, that, in case of loss, the society was to pay, and it was further *stipulated* and *declared* that the directors should not be liable except under the articles establishing the society, one of which was that losses were to be made good within ninety days, the court refused the defendant's motion to arrest judgment on the ground that there was no agreement, and held that the action would lie.³

A covenant to pay a certain amount, in case of loss or damage, out of the money raised by the first instalments, or

¹ *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517.

² 6 J. B. Moore, 202, n.

³ *Andrews v. Ellison*, 6 Moore, 199.

calls on shares in the company, is a simple covenant to pay, not limited or qualified by the condition precedent that there should be funds in hand arising from calls or shares sufficient for that purpose. The liability of the company does not at all depend upon the question from what source the funds to discharge it are to come, or on the question whether or not there are any funds.¹

§ 29. **The Policy.** — But although it may now be considered as settled that a verbal agreement would be valid, and that the particular form of the contract is of secondary importance, yet it is the almost universal practice to embody the terms of the contract in a written instrument called a **POLICY**.² This should contain the names of the contracting parties; of the *insurer*, who signs or underwrites the policy, and hence is frequently termed the *underwriter*, whereby he obligates himself, in consideration of a certain sum, called the *premium*, to him paid by the other party, to take upon himself the hazard, called the *risk*, and to make good to him the particular loss he may sustain; and of the *insured*, who pays the premium to secure this indemnity against loss. It should also contain the precise *time* from which the risk commences and at which it terminates; a *description of the* property, or life, or other *subject-matter* of insurance; the *conditions* to which the contract is subject; the *limitations* upon the risk; and, in short, all such facts and data about which disputes may arise, as are not susceptible of settlement by resort to the general principles which govern the contract. In practice the description of the subject-matter, except in a general way, and the conditions, are not usually incorporated into the body of the policy proper. The former is contained in a separate paper termed the *application* or *declaration*, deposited with the underwriter by the party applying for insurance, while the latter are indorsed upon the back of the policy. They are both, however, made component parts of the policy by reference,³ and constitute its

¹ *Pilbrow v. Atmospheric Railway Co.*, 5 C. B. 440.

² For form, see Appendix.

³ *Worsley v. Wood* (in error), 6 T. R. 710; *Routledge v. Burrell*, 1 H. Bl.

most essential features, requiring the especial consideration of the party seeking protection. It is not unusual to insert in the policy a special clause called the *memorandum*, exempting the insurer, either wholly or partially, from liability for loss or damage to certain specified articles, or on account of certain specified causes, or containing some particular condition, limitation, or exemption not contained in the usual form, and which arises out of the circumstances of the particular case.

[§ 29 A. **What constitutes Part of the Policy.** — We have already noted in the preceding section that an application *referred to in the policy as a part of it*, becomes part of it in legal contemplation, and there is an unbroken current of authority to that effect.¹ But the rule that an application, survey, description, &c., referred to in the policy, shall be a part of it, does not apply where the application, &c., is not in writing.²

How far marginal notations and indorsements are to be considered as part of the contract, depends upon what seems to be justice, and the intent of the parties on all the facts of the case that are properly in evidence. Words and figures in the margin of a policy and connected with it in sense are a part of it.³ In general, memoranda on the margin of a policy are a part of the contract of insurance, and are as binding as though in the body of the policy.⁴ But it has been held that the clause, "Non-forfeiture endowment policy with profits," in the margin of a policy, cannot be read as a part of it.⁵ An indorsement proved to have been made upon an instrument before it is executed may be parcel of the obligation.⁶ But in the absence of such proof, an indorse-

254; *Oldman v. Bewicke*, 2 id. 577, note; *Holmes v. Charlestown Mut. Fire Ins. Co.*, 10 Met. (Mass.) 211.

¹ [*Egan v. Mutual Ins. Co.*, 5 Denio (N. Y.), 326, 327; *Md. Ins. Co. v. Bossiere*, 9 G. & J. 121, 155; *Bobbitt v. Liv. & Lon., &c. Ins. Co.*, 66 N. C. 70; *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606; *Carson v. Jersey City Ins. Co.*, 43 N. J. 300.]

² [*O'Brien v. Ohio Ins. Co.*, 52 Mich. 131.]

³ [*Pierce v. Charter Oak Ins. Co.*, 138 Mass. 151.]

⁴ [*McLaughlin v. Atlantic Ins. Co.*, 57 Me. 170, 173.]

⁵ [*McQuitty v. Continental L. Ins. Co.*, 15 R. I. 573.]

⁶ [*Emerson v. Murray*, 4 N. H. 171.]

ment on the policy not referred to in the policy or in the by-laws, will be deemed the act of the insurer and not binding on the assured.¹ A diagram of the buildings insured on the back of an application does not bind the assured in the absence of proof that he had something to do with it, although by printed directions the agents were required to draw the same.²

[§ 29 B. Negotiations and agreements prior³ to or contemporaneous with the policy are merged in it, and unless in writing and referred to in the policy, or by law made a part of it, are of no avail after the issue of a valid policy except to show misrepresentation, or to establish a case for the reformation of the policy, or to show that the delivery was not absolute.

No oral agreement at the time of insurance that is not incorporated in the policy can overcome a prohibition of the policy.⁴ Statements of an insurance agent prior to the execution of the policy are not admissible against the company to vary the terms of the written contract.⁵ A memorandum or slip offered to show the intention of the parties as opposed to a written policy of insurance between them, is inadmissible. In law, it is only evidence to prove a misrepresentation; in equity, to correct the policy.⁶ When a policy contained no reference to a published prospectus from which it materially differed, in an action on the former, the latter was held inadmissible, to extend and enlarge the terms of the policy.⁷

[§ 29 C. *Statutes requiring Annexation of the Application to the Policy.* — By the Iowa statute a copy of the application must be indorsed on or attached to the policy, in order to enable the company to rely on false statements in the appli-

¹ [Planters' Mut. Ins. Co. v. Rowland, 66 Md. 236.]

² [Vilas v. N. Y. Central Ins. Co., 72 N. Y. 590, 593.]

³ [Greenwood v. N. Y. L. Ins. Co., 27 Mo. App. 401, 411; Insurance Co. v. Mowry, 96 U. S. 544.]

⁴ [Sperry v. Springfield F. & M. Ins. Co., 26 Fed. Rep. 234 (Col.), 1886.]

⁵ [Sullivan v. Cotton States L. Ins. Co., 43 Ga. 423, 427.]

⁶ [Daw v. Whetten, 8 Wend. (N. Y.) 160, 166.]

⁷ [Mut. Ben. L. Sus. Co. v. Ruse, 8 Ga. 534, 539.]

cation as matter of defence.¹ So in Iowa, if a company fails to attach a copy of the application, signature and all, to the policy of which it is declared to be a part, every statement in the application is conclusively presumed to be true as against the company.² And in Pennsylvania, unless a copy of the application is attached to the policy, it constitutes no part thereof, and is not receivable in evidence.³ But a statute that merely prohibits the use of an application for the purpose of qualifying the policy unless attached to it, does not interfere with the use of the application to show fraud in obtaining the policy.⁴

§ 30. **Kinds of Policies.** — Policies are divided into *valued* and *open*, *wager* and *interest*,⁵ *time* and *voyage*.⁶ A *valued* policy is one in which the sum to be paid as an indemnity in case of loss is fixed by the terms of the contract;⁷ an *open* policy is one in which the sum so to be paid is not fixed, but is left open to be proved by the claimant in case of loss, or to be determined by the parties,⁸ and the determination is called the *adjustment of the loss*. The difference between a valued and open policy, in point of *form*, is this, that the blank which is intended to be filled up by the sum at which the parties agree to fix the value of the property insured, and the amount of damages to be recovered in case of loss, as between themselves, is filled up in the former, while it is not filled in the latter, or, at least, is not stated as an agreed valuation, or sum to be recovered in case of loss. The difference between them in point of *effect* is, that under an open policy, in case of loss, the insured must prove the true value of the property insured, while under a valued policy he need

¹ [Cook v. Federal L. Ass., 74 Iowa, 746.]

² [Dunbar v. Phenix Ins. Co., 72 Wis. 492 ; R. S. § 1945 a.]

³ [Act of May 11, 1881, P. L. 20 ; Imperial F. Ins. Co. v. Dunham, 117 Pa. St. 460, 473 ; New Era L. Ins. Co. v. Musser, 120 Pa. St. 384.]

⁴ [Carrigan v. Mass. Ben. Ass., 26 Fed. Rep. 230 (Pa.), 1884.]

⁵ [See § 33.]

⁶ [See § 34.]

⁷ [A policy is valued only when a valuation is fixed by way of liquidated damages to avoid making a valuation after loss. Universal Ins. Co. v. Weiss, 106 Pa. St. 20, 27.]

⁸ [Fire Ins. Ass. v. Miller, 2 Tex. Civ. Cas. § 332.]

never do so, the sum agreed upon being taken as conclusive both at law and in equity, unless in cases of *fraud*, or of such excessive overvaluation as to raise a presumption of fraud.¹(a) And the overvaluation, in the expressive lan-

¹ *Haigh v. De la Cour*, 3 Camp. 319; 1 Arnould on Insurance, 304; *Alsop v. Com. Ins. Co.*, 1 Sumner, 451; *Feise v. Aguilar*, 3 Taunt. 506; *Carson v. Marine Ins. Co.*, 2 Wash. C. C. 468; *Lewis v. Rucker*, 2 Burr. 1167; *Shawe v. Felton*, 2 East, 109; *Forbes v. Aspinall*, 13 id. 323, 326; *Holmes v. Charlestown Mut. Fire Ins. Co.*, 10 Met. (Mass.) 211; *Young v. Turing*, 2 Scott, N. R. 752; *Coolidge v. Gloucester Mar. Ins. Co.*, 15 Mass. 341; *Lycoming County Mut. Ins. Co. v. Mitchell*, 48 Pa. St. (12 Wright) 367, 372; *Laurent v. Chatham Fire Ins. Co.*, 1 Hall (N. Y. Superior Ct.), 41; *Cushman v. North Western Ins. Co.*, 34 Me. 487; *Borden v. Hingham Mut. Fire Ins. Co.*, 18 Pick. 523; *Phoenix Ins. Co. v. McLoon*, 100 Mass. 475; *Miller v. Germania Fire Ins. Co.*, C. P. (Pa.) 6 Ins. L. J. 873. By the French law, the valuation is not conclusive if it exceeds "reasonable limits." Decree of the Court of Aix, March 24, 1830, cited in Rogron, *Code de Commerce Expliqué*, art. 336, n.; *Pardessus, Cours de Droit Com.* 593, 6 and 7; *Alauzet, Traité Général des Assurances*, 221 *et seq.*; 3 Kent's Com. 273, n. (d), and cases there cited. *Boulay-Paty* is, however, incorrectly cited. He agrees with the other authors. *Cours de Droit Com. Mar.* tit. 10, § 20. And what are "reasonable limits" is to be determined by the circumstances of each particular case. Probably they would not differ much from the "grossly enormous" overvaluation of Mr. Justice Yeates, or that excessive overvaluation which raises a presumption of fraud, of the other authorities.

(a) The question of fraud in valuation is one of fact for the jury; such fraud need not be proved beyond a reasonable doubt, and must have been intended. *F. Dohmen Co. v. Niagara F. Ins. Co.*, 96 Wis. 38; *Commercial Ins. Co. v. Friedlander*, 156 Ill. 595; *Western Ass. Co. v. Ray* (Ky.), 49 S.W. 326; *Phoenix Ins. Co. v. McKernan* (Ky.), 46 id. 10; *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330; *Teutonia F. Ins. Co. v. Howell* (Ky.), 54 S.W. 852; *German Ins. Co. v. Read* (Ky.), 13 S.W. 1080; *Hanover F. Ins. Co. v. Stoddard*, 52 Neb. 745; *Virginia F. & M. Ins. Co. v. Saunders*, 86 Va. 969. Under an open policy, the jury, being bound to ascertain whether the loss was total or partial, and the market value of the property, cannot find for the plaintiff if the evidence as to such value is too indefinite for them to determine it. *Manchester F. Ass. Co. v. Feibelman*, 118 Ala. 308, 329; *Cascade F. & M. Ins. Co. v. Journal Pub. Co.*, 1 Wash. St.

452. See *Hand v. National Live-Stock Ins. Co.*, 57 Minn. 519; *Purves v. Germania Ins. Co.*, 44 La. An. 123.

The valued policy statutes of Missouri and other States, prohibiting the insurer from denying that the amount insured, less any depreciation, represents the value of the insured property, in effect change open policies to valued policies; though making no contract for the parties, they estop them, after they have voluntarily fixed the valuation, from denying that valuation when there is no fraud; they do not create wagers, and are constitutional. *Orient Ins. Co. v. Daggs*, 172 U. S. 557. See also as to such statutes, *Havens v. Germania F. Ins. Co.*, 123 Mo. 403; *O'Keefe v. Liverpool, &c. Ins. Co.*, 140 Mo. 558; *Ins. Co. v. Leslie*, 47 Ohio St. 409, 416; *British America Ass. Co. v. Bradford*, 60 Kansas, 82; *Ins. Co. of North America v. Bachler*, 44 Neb. 549; *Gibson v. Conn. F. Ins. Co.*, 77 Fed. Rep. 561; *Seyk v. Millers'*

guage of Mr. Justice Yeates,¹ must be "grossly enormous" to admit of any dispute. The statement as to value of property insured is not a warranty but matter of opinion, which, if honestly entertained, does not vitiate the policy.² The agreed value does not, however, admit an insurable interest, and this must be proved to some extent.³ And the insured is concluded by the valuation as well as the insurer.⁴

§ 31. *Valued and Open Policies.* — Whether the policy is an open or valued one is not unfrequently a question of some difficulty. The words "valued at," as qualifying the property insured, are frequently used; but any form of words showing the intention of the parties to fix the value of the property is sufficient. If the property insured consists of a single article, or of separate and distinctly different articles, either in character or value, and the insurance is in a gross sum upon all, as, for instance, \$10,000 on one brick house, or upon one brick and two wooden houses, nothing being said of the value, this is not a valued policy. The sum here neither fixes the total value of all, nor the proportionate value of either, and in case of loss of either or all, the question is open for proof as to the amount of the loss.⁵ But where there is a total loss of an article distinctly valued in the policy, the loss is to be estimated according to the valuation. And if the insurance be upon numerous articles of equal value, under a valuation of the whole, the insured will recover of the whole valuation the proportion which the number lost bears to the whole number insured; as, where ten hogsheads of tobacco, specified to be worth

¹ *Miner v. Tagert*, 3 Binn. (Pa.) 204, 205. And see *post*, § 373.

² *Redford v. Mut. Fire Ins. Co.*, 38 U. C. (Q. B.) 538.

³ *Feise v. Aguilar*, 3 Taunt. 508; s. c. Hildyard on Marine Insurance, 264; *Kane v. Com. Ins. Co.*, 8 Johns. (N. Y.) 176; *Pleasants v. Maryland Ins. Co.*, 8 Cranch, 55; *Clark v. Ocean Ins. Co.*, 16 Pick. (Mass.) 289, 295.

⁴ *Holmes v. Charlestown Mut. Fire Ins. Co.*, 10 Met. (Mass.) 211.

⁵ *Laurent v. Chatham Fire Ins. Co.*, 1 Hall (N. Y. Superior Ct.), 41; *Wallace v. Insurance Co.*, 4 La. 289; *Luce v. Springfield Fire & Mar. Ins. Co.*, Cir. Ct. (West. Dist. Mich.), 2 Ins. L. J. 443; *post*, § 425.

National Ins. Co., 74 Wis. 67; *Sullivan* the value of personal property. *Joy v. v. Hartford F. Ins. Co.*, 89 Texas, 665. *Security F. Ins. Co.*, 83 Iowa, 12; In Iowa, the amount stated in the *Martin v. Capital Ins. Co.*, 85 id. 643. policy is not *prima facie* evidence of

\$1,000, are insured, the loss of one will give the right to recover \$100, or the same proportion of the amount insured.¹ (s) A valuation in the application referred to in the policy has the same effect as if stated distinctly in the policy. Thus, a policy having this clause: "The amount insured being not more than three-fourths the value of said property, as appears by the proposal of the said insured," is a valued policy.² So where, while there was a printed stipulation in the policy that the loss or damage was to be estimated according to the true and actual cash value of the property at the time of loss, it was written in that the plaintiff was insured "to the amount of \$2,000; viz., on the building and fixed machinery, \$1,700; on movable machinery therein, \$150; on stock, raw and wrought, \$150, — said insured being the lessee of said mill for one year, from Nov. 1, 1850, and having paid the rent therefor of \$2,171.01, which interest, diminishing day by day, in proportion for the whole rent for a year, is hereby insured," the court held that the policy was a valued one as to the first two items. If an open policy, neither the plaintiff nor defendant could be benefited in any degree by the insertion therein particularly of the rent paid by the insured to the lessor; it was wholly immaterial and unnecessary; nor, if it was an open policy, was there any occasion to recite that the interest was one diminishing day by day. This was one element in the value of the loss, and one so obvious, especially if the policy was near its expiration, or had run any considerable time, that it could not be expected to be overlooked. And although it was agreed that the loss or damage should be estimated according to the actual cash value at the time of the loss or damage, still the parties could fix upon a rule, and did, in this case, fix upon a rule by which the cash value was to be determined, not the less a rule, because it permitted of variation day by day.³ (t) But where the application stated the property to

¹ *Harris v. Eagle Ins. Co.*, 5 Johns. (N. Y.) 368.

² *Nichols v. Fayette Mut. Fire Ins. Co.*, 1 Allen (Mass.), 63; *Fuller v. Boston Fire Ins. Co.*, 4 Met. (Mass.), 206; *Phoenix Ins. Co. v. McLoon*, 100 Mass. 475.

³ *Cushman v. North Western Ins. Co.*, 34 Me. 487. The policy in this case

be worth \$1,200, and it was insured for \$800, "being not more than three-fourths of the value of the property described in the application," and the policy also contained the provision that "this company shall in no event be liable beyond the sum insured, nor beyond three-fourths of the actual cash value of the property insured at the time of loss or damage, nor beyond such sum as will enable the insured to replace or restore the property lost or damaged," this latter clause was held to control the former, and to open the question as to value, which otherwise would have been fixed.¹ But a clause, providing that the "company shall not be held to pay any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on said property," is operative only when there is other insurance; and, in the absence of other insurance, does not convert a valued policy, like the one in the case last cited, into an open one;² nor, where there is a subsequent valued policy indorsed upon the first, is the first thereby converted into a valued one.³ [A policy for \$2,000 on freight is an open one.⁴]

[§ 31 A. *Statute Valuation*. — In Texas, "a fire insurance policy in case of total loss becomes a liquidated demand against the company for the full amount of the policy, provided that this article shall not apply to personal property." ⁵]

§ 32. The same policy may be open as to one article insured and valued as to another. This was the case in *Post*

was dated Nov. 8, 1850; and the fire took place Nov. 23, 1850. The jury returned a verdict assessing the damages, including interest, at \$1,872.12, with a special finding that the loss on movable machinery was \$151.79, and included in the verdict.

¹ *Brown v. Quincy Mut. Fire Ins. Co.*, 105 Mass. 396. [The same point was decided in Ohio, where it was held that a policy for \$800 on a house worth \$2,400, with an agreement to pay all loss up to the sum named, is an open not a valued policy. *Farmers' Ins. Co. v. Butler*, 38 Ohio St. 128.]

² *Luce v. Dorchester Ins. Co.*, 105 Mass. 297, 298.

³ *Millaudon v. Western Mar. & Fire Ins. Co.*, 9 La. 27.

⁴ [*Riley v. Hartford Ins. Co.*, 2 Conn. 368, 370.]

⁵ [*Sun Mut. Ins. Co. v. Holland*, 2 Tex. Civ. Cas. 448, substance of R. S. art. 2971.]

v. Hampshire Mutual Insurance Company,¹ where there was an insurance of \$500 on a house valued at \$750, and also of \$500 on furniture, to which no value was fixed. But as the by-laws reserved to the company in this case the right to have a valuation made anew, without regard to the valuation fixed in the policy, they were not concluded by that fixed valuation. It was also the case in *Cushman v. Northwestern Insurance Company*.²

§ 33. **Wager and Interest Policies.** — A *wager* policy is one in which it appears by its terms that the insured has no interest, or, in other words, runs no risk. It is a mere bet, and is known by the insertion of certain clauses, — such as, “*without further proof of interest than the policy*,” “*interest or no interest*,” and their equivalents, — having for their object to relieve the insured from the necessity of proving his interest in case of loss. In England, such policies are prohibited, and such clauses are proof conclusive that the contract is a wager. In this country, however, they are only *prima facie* evidence, and may be explained.³ An *interest* policy is one in which it appears by its terms that the insured is interested in the thing insured, or, in other words, runs a risk. He has something at stake, and, in case of loss, something to be indemnified for. Policies are usually in this form, and import, unless otherwise expressed, that the assured is interested in the subject-matter.⁴

§ 34. **Time and Voyage Policies.** — A *time* policy is one in which the duration of the risk is fixed by definite periods of time, as from January 1st, M., 1852, to January 1st, M., 1853, or for one year from a specified date. A *voyage* policy is one in which the duration of the risk is determined by geographical limits, as from New York to Liverpool, and is applicable to cases of transportation by land as well as by water.⁵

¹ 12 Met. (Mass.) 555.

² *Ubi supra*.

³ *Alsop v. Com. Ins. Co.*, 1 Sumner, 451, 467. See § 74.

⁴ *Williams v. Smith*, 2 Caines (N. Y.), 1, 13; *Cousins v. Nantes*, 3 Taunt. 513.

⁵ *Boehm v. Combe*, 2 M. & S. 172.

§ 35. **Who may be Parties.** — Parties competent to contract generally may be parties to a contract of insurance. The insurers may be private individuals, or companies of associated individuals, and so may the insured. In this country, the business, though previously to the commencement of the present century mostly in private hands, is now almost exclusively in the hands of incorporated companies; and there is a large and increasing class of these based upon the mutual principle, in which the members are at once the insurers and the insured, and whose business is limited to such risks as are authorized by their charters, while individuals may assume any lawful risk.¹ In England, private underwriting in mercantile insurance is largely carried on by a society of capitalists, who meet daily for the transaction of business at Lloyd's Subscription Rooms, and are hence called members of "Lloyd's." Each member underwrites his name to the policy offered, if he chooses to take any portion of the risk, and against it the amount for which he will be liable in case of loss, with the date of his subscription. Formerly, private underwriting was extensively carried on on the continent of Europe; but there, as well as in England, the superior advantages of public companies are gradually leading to an abandonment of the ancient practice.

[§ 35 A. *Infants, Unlicensed Merchant, Parties joining.* — A contract of insurance is not a contract for necessities which will absolutely bind an infant.² It is voidable by the infant, but not by the company.³

In Mississippi if a merchant makes a contract of insurance on his business while he is *unlicensed*, he cannot recover on the policy.⁴

Several parties interested in the same property may take out joint insurance upon it, and a joint policy may be taken on property owned in severalty.⁵]

¹ Andrews v. Union Mut. Fire Ins. Co., 37 Me. 256.

² [N. H. M. F. Ins. Co. v. Noyes, 32 N. H. 345, 352.]

³ [Monaghan v. Agri. F. Ins. Co., 53 Mich. 238, 243.]

⁴ [Pollard v. Phoenix Ins. Co., 63 Miss. 244.]

⁵ [Castner v. Farmers' Mut. F. Ins. Co., 46 Mich. 15.]

CHAPTER III.

THE EFFECT OF WAR.

ANALYSIS.

1. The thought at the basis of the subject (§ 42 A).
 Private interests must yield to public, but are to be interfered with only so far as the public purposes positively require (§ 42 A).
 No subject can do anything detrimental to the interests of his country (§ 36), — *voluntary submission to the enemy, receiving his protection*, or any act or contract which tends to *increase his resources*, as transmission of money or goods or any kind of trading or commercial dealing between the two countries, is unlawful (§ 42).
2. During the war
 a contract of insurance cannot be made across the line of hostilities (§ 36).
 such a contract is void (§ 37).
 an enemy's property in general cannot be insured, and the disability extends to subjects dealing in enemy's property (§ 37).
 and insurance of the life or health of one in the enemy's service is void (§ 37 s.).
 the life and property of an alien enemy domiciled here may be insured (§ 42 s.).
3. A contract made before the war
 is only suspended until the conflict is over (§ 37), and then revives (§§ 39, 41, 43).
 except that no recovery can be had for loss of property by capture or otherwise, in consequence of the fight (§ 36), unless the property was exempt from hostilities (§ 39 s.).
 nor for any loss of life or health in the enemy's service (§ 7 s.).
 is good as to property and lives exempt from belligerent power (§§ 39 s., 42 s.).
e. g. the life of a neutral domiciled in the enemy's country (§ 39 s.).
 may be kept alive by paying premiums to resident agent (§ 40).
4. Domicil of the owner in the enemy's country is the general test as to property (§§ 38, 42 s.).
 and the line of demarcation is that claimed and held by the belligerent power (§ 38).
 if the United States were at war with Spain, a Spaniard domiciled here could contract and sue here like a citizen (§ 42 s.).
 in respect to life, hostile nationality must be combined with domicile in the enemy's country to avoid the insurance (§ 39 s.).

5. Conditions of the policy
as to premium and forfeiture for non-payment of it do not apply to war (§ 39 A.).
payment to agent here good (§§ 39 A., 40).
payment to agent in 'South, in Confederate money, good (?) (§ 39 A.).
tender and refusal of one premium makes tender of subsequent dues unnecessary (§ 40 n.).
notice and proof after the war sufficient (§ 39 A.), limitation of suit extended by war (§ 39 A.).
6. An agency in a hostile country (Spain, for example) of a company located here,
could not be created during a war between the countries (§§ 36, 42 s.).
but, if previously created, it would not be revoked or suspended, except as to the taking of new risks and the transmission of premiums (§ 40).
premiums accruing on contracts made before the war could be and *must* be *received* by the agent, but not forwarded till after the conflict (§§ 40 n., 42 s.).
of an English company would be neutral, although he was a sub-agent appointed by an agent of the English company who was resident here (§ 40).
7. *When* war begins so as to affect insurance (§ 38).
In civil war the rules are the same (§ 38).
Mutual companies same rules (§ 39 s.).

§ 36. **War.** — The subjects of two hostile states cannot make a valid contract of insurance, while the war continues.¹ And it has even been held that an English underwriter on French property in time of peace is not liable for a loss occasioned by capture by British ships during hostilities which commenced between Great Britain and France subsequent to the time when the policy was made, and terminated prior to the bringing of the action.² And it was said, in *Brandon v. Curling*,³ that every insurance on alien property, by a British subject, must be understood with this implied exception, that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the insured and the insurer. In such a case, though the contract is legal at the time the risk commences,

¹ *The Hoop*, 1 Robinson (Eng. Adm.), 196; *The Emulous*, 1 Gallison, 562, 571; *Griswold v. Waddington*, 16 Johns. (N. Y.) 438.

² *Gamba v. Le Mesurier*, 4 East, 407.

³ 4 East, 410.

and the insured cannot therefore claim a return of the premium, yet considerations of public policy are so stringent as to vitiate a once valid contract, by importing into it an implied condition which becomes operative upon a contingency beyond the control of either of the parties.¹ This last case was decided in the face of a practice which had grown up under the patronage of Lord Mansfield, who went so far as to try causes in which the same question arose, and permitted foreigners in their own names and for their own benefit, during the war, to recover on policies of insurance on foreign goods against British capture. Yet Lord Alvanley, though he could not help animadverting upon the immorality of the defence, felt bound to sustain it, on the ground that no subject can be permitted to enter into a contract to do anything which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if expressly forbidden by an act of Parliament. When hostilities commence between the countries of the underwriter and the insured, the former is forbidden to fulfil his contract.

§ 37. **Effect of War.** — That a subject may not enter into such a contract is probably more than was meant to be said; for such a contract is certainly legal in its inception, and its invalidity supervenes upon a contingency which he could not foresee. But that he is absolved from any legal obligation to fulfil it, and will not be compelled by the courts so to do, from the moment when it proves to be detrimental to the interest of the state, is now the established law.² In *Bell v. Gilson*,³ the judges undertook to relax somewhat the severity of the rule in favor of contracts entered into between British subjects about property purchased of the enemy by a British subject during the war, and held that property so purchased should not be considered as enemy's

¹ *Furtado v. Rodgers*, 3 Bos. & Pul. 191.

² See 3 Kent's Com. 255; and *Griswold v. Waddington*, 16 Johns. 438, where the whole subject of contracts between alien enemies is discussed with great ability and research. See also Mr. Du Ponceau's note to his translation of Bynkershoek on the Laws of War, p. 165.

³ 1 Bos. & Pul. 345.

property. But this case was afterwards overruled, and the disability to contract now extends alike to alien enemies and to subjects dealing in enemy's property. And it appears now to be the law of England, that war between the two countries to which two contracting parties respectively belong suspends a contract entered into before the breaking out of hostilities, and annuls it if entered into while hostilities continue.¹

(s) It seems also that the law will not permit an insurance company to indemnify a policy-holder who has lost his health, life, or property in the service of the enemy, whether loss from such cause be excepted in the policy or not.² [If the assured joins in active hostilities his life policy becomes void.³] This was also the doctrine in another case in this country,⁴ where there was a provision in the policy which exempted the company from liability if the insured entered the military service, and it appeared that he was upon the staff of several Confederate generals, though he had no commission. The court thought this entering the military service within the meaning of the policy; but put the case upon the broader ground of public law, which forbids the insurance of the life of a person who enters into the service of the enemy, and avoids a policy for that reason, without any stipulation to that effect, and even though the policy expressly agreed to pay if the death occurred in such service.⁵

§ 38. **Effects of the Civil War.** — The question of the effect of the late civil war in this country upon the relations of parties to contracts generally, though not strictly a question of insurance, has been discussed in several insurance cases, which it may be useful to note in this connection. The general doctrines applicable to the subjects of belliger-

¹ *Ex parte Boussmaker*, 13 Ves. Jr. 71.

² *Ex parte Lee*, 13 Ves. Jr. 64.

³ [*Sands v. N. Y. L. Ins. Co.*, 50 N. Y. 626; *Hamilton v. Mut. L. Ins. Co.*, 9 Blatchf. 234.]

⁴ *Mitchell v. Mut. Life Ins. Co. of New York*, not reported, but cited in *Bliss on Life Insurance*, 643.

⁵ See also *New York Life Ins. Co. v. Clopton*, 7 Bush (Ky.), 179, and *post* § 39.

ent nations have been declared by the Supreme Court of the United States to be also applicable to the hostile parties in the late civil war;¹ and by the same court the commencement of the period of belligerency was declared to be the date of President Lincoln's first proclamation for troops, though elsewhere² it was held to be the 16th of August, 1861, the date of the proclamation issued by the President in pursuance of the non-intercourse act passed by Congress on the thirteenth day of July preceding; and domicile in the enemy's territory, without regard to personal sympathy, is the test as to the hostile status of the particular individual.³ And the line of demarcation is that claimed and held by the belligerent power.⁴

§ 39. The civil war had not the effect to dissolve a contract of life insurance entered into prior to its commencement by parties belonging to the respective belligerents, and kept in force until the breaking out of the war. While in such cases as partnership and affreightment, where the performance is continuous and unremitting until the end of the contract shall have been consummated, and therefore supervening war between the parties disables them from performing any of the incumbent duties, and defeats the object of the contract, a dissolution of the contract is the natural and legal effect of the war, neither the principle nor policy of the law will avoid a pre-existing and valid contract which may be performed by a single act, or by periodical acts, between which there is nothing to be done and no continuity of performance, such as the payment of a debt or the payment of premiums. In such a case the suspension of the remedy during the war is the consistent and only legitimate effect of the war. Belligerent policy interdicts the payment, because it might aid the enemy in the prosecution of hostili-

¹ Prize Cases, 2 Black (U. S.), 635.

² *Leathers v. Com. Ins. Co.*, 2 Bush (Ky.), 296, 298. In the cases of *The Protector*, 12 Wall. (U. S.) 700, April 27, 1861, the date of the proclamation of intended blockade was fixed as the day.

³ *Mrs. Alexander's Cotton*, 2 Wall. (U. S.) 404; *New York Life Ins. Co. v. Clopton*, 7 Bush (Ky.), 179.

⁴ Prize Cases, 2 Black (U. S.), 635.

ties. Suspension of the performance, therefore, until the restoration of peace, will effectuate the whole aim of the law without dissolving the contract, which may be ultimately enforced in perfect consistency with the principle and end of the temporary interdict. In such a case it is the contract, and not the performance, which is continuing; and the suspension of the remedy, and not a dissolution of the contract, is all that is necessary, befitting, or just.¹ [*Contrary views* have, however, been asserted with considerable force, though without any reasons at all comparable in weight with those favoring the ordinary opinion that the contract is only suspended, not avoided by war.²]

(s) The ordinary contract of insurance does not belong to the class of contracts of continuing performance. It is *sui generis*, governed by a peculiar and rather arbitrary code of the modern common law, but recently moulded, and not yet stamped in all respects with conclusive authority. Its character, however, is so far matured and established as to distinguish it essentially from ordinary commercial contracts, and especially in the effect of war on its pre-existing validity, which the war as a general rule destroys, whether the contract belongs to the category of continuing performance or not.³ The rule is the same where the insurers are a mutual company. The relation of insurer to insured is not one of partnership.⁴

¹ [Insurance is not *ipso facto* terminated by hostilities which make the insured and insurer public enemies. *Statham v. N. Y. L. Ins. Co.*, 45 Miss. 581; *Cohen v. Mut. L. Ins. Co.*, 50 N. Y. 610; 2 *Ins. Law Jour.* 426; *Manhattan L. Ins. Co. v. Warwick*, 20 *Grat.* 614; *Hancock v. N. Y. L. Ins. Co.*, 2 *Ins. Law Jour.* 903, U. S. C. C., East. Dist. Va. If the continuance of the contract implied commercial intercourse it would be void. But it does not. *Sands v. N. Y. L. Ins. Co.*, 50 N. Y. 626; 2 *Ins. L. Jour.* 372; *Woods v. Wilder*, 43 N. Y. 164; *Buchanan v. Curry*, 19 *Johns.* 137; *Bell v. Chapman*, 19 *Johns.* 133; *United States v. Wiley*, 11 *Wall.* 508.]

² [*Tait v. N. Y. L. Ins. Co.*, MSS. U. S. C. C., West. Dist. of Tenn., cited by *Bliss*, § 392; also *Dillard v. Manhattan L. Ins. Co.*, 44 *Ga.* 119.]

³ *New York Life Ins. Co. v. Clopton*, 7 *Bush (Ky.)*, 179. See also *post*, § 350.

⁴ *Hamilton v. Mut. Life Ins. Co.*, 9 *Blatch. C. Ct.* 234, affirmed by an equally divided court in the United States Supreme Court; *Mutual Benefit Life Ins. Co. v. Hillyard*, 37 *N. J.* 444; *Cohen v. Mut. L. Ins. Co.*, 50 *N. Y.* 610. Referring to the cases of *Furtado v. Rodgers* and *Brandon v. Curling*, *ante*, § 36, where it was said by the court, — the question arising under a policy of marine insurance, —

[§ 39 A. **War and the Conditions of the Policy.** *Premiums, notice, and proof. Limitation of suit.* — The condition of forfeiture for non-payment of premiums does not contemplate war. If within a reasonable time after hostilities have ceased the assured pays or tenders the premiums due, no forfeiture takes place.¹ If there is an agent of the company in the country of the assured, a tender of the premium to him will at least save forfeiture.² If the company fail to keep an agent in the hostile territory, payment of the premiums is excused till after the war.³ Payment to the agent made in Confederate money is good.⁴ If loss occurs during the war the assured may recover on giving notice and proof within a reasonable time after the war.⁵ War extends the

that policies entered into prior to the war became void by the supervention of war, as in every such policy there was an implied condition that the insurance should not extend to cover any loss happening during the existence of hostilities between the respective countries of the insured and the insurer, the court, in the above Kentucky case, observe: "It may be a grave question whether the implied condition as to the perils of war should be extended beyond the belligerent right of capture or destruction by the government of the insurer, and to that extent only we may admit that the continuation of the policy during the war would be illegal, and its pre-existing obligation become avoided. But the principle of this concession would not avoid a policy insuring property which is exempted by law from belligerent power; and while it would avoid a policy insuring the life of one who becomes an actual enemy of the government of the insurer, which had the right to destroy that life, it would not affect the validity of the insurance of the life of a neutral or passive non-combatant, over whose life there is no belligerent power; for though the domicile makes him a technical enemy, whose property may be lawfully captured as enemy's property, yet as such nominal hostility does not subject his life, like his estate, to peril, no belligerent right is affected by the continued validity of the insurance; and, consequently, in such a case neither authority nor principle would avoid a policy any more than if it had insured the life of a child in the cradle, or insured property exempt from capture or confiscation." See also *Manhattan Life Ins. Co. v. Warwick*, 20 Grat. (Va.) 614; *Semmes v. City Fire Ins. Co.*, 6 Blatch. (C. Ct. U. S.) 445; s. c. in the Supreme Court of the United States, 13 Wall. (U. S.) 158, 159. See also *post*, § 350.

¹ [Cohen v. Mut. L. Ins. Co., 50 N. Y. 610.]

² [Hamilton v. Mut. L. Ins. Co., 9 Blatch. 234.]

³ [Id.; *Manhattan Ins. Co. v. Warwick*, 20 Grat. 614.]

⁴ [Sands v. N. Y. L. Ins. Co., 50 N. Y., 626; *Robinson v. International Ass. Soc.*, 42 N. Y. 54. *Contra*, *Manhattan L. Ins. Co. v. Warwick*, 20 Grat. 614 (company may refuse payment in Confederate money).]

⁵ [N. Y. L. Ins. Co. v. Clopton, 7 Bush, 179; *Cohen v. Mut. L. Ins. Co.*, 50 N. Y. 610; *Hillyard v. Mut. Ben. L. Ins. Co.*, 35 N. J. 415; *Seyms v. N. Y. L. Ins. Co.*, U. S. C. C. South. Dist. Miss. (MSS.). *Contra*, *Dillard v. Manhattan L. Ins. Co.*, 44 Ga. 119.]

statute of limitations,¹ and the effect upon an agreed limitation would no doubt be the same.]

§ 40. **Agency as affected by War.** — Nor does the occurrence of war revoke the powers of an agent, domiciled in the enemy's country, of a foreign insurance company, having a general agency managed by a board of directors in the country of the other belligerent, by whom the first-mentioned agent is appointed. The Virginia agent appointed by the resident New York agency of a London office is the agent of a neutral, and the contract of insurance effected by the Virginia agent with a citizen of that State in behalf of the company is a contract between a neutral and a belligerent, and the agent's powers are not revoked by the breaking out of war.² And even the agent, resident in one belligerent's territory, of a company established in the territory of the other belligerent, may (or rather *must*)³ receive payments of premiums as they fall due, and thus keep alive the policy, though he may not remit them,⁴ and his power may be so far suspended that he cannot negotiate policies.⁵

¹ [Semmes v. Hartford Ins. Co., 13 Wall. 158; Hanger v. Abbott, 6 Wall. 532; The Protector, 9 Wall. 687, — even against the United States, see United States v. Wiley, 11 Wall. 508.]

² Robinson v. International Life Assurance Society of London, 42 N. Y. 54; Martine v. International Life Assurance Society of London, 62 Barb. (N. Y.) 181. See also *post*, § 350.

³ [It is the agent's duty to receive the premiums, and if he refuses, the assured may, after the war, bring suit for the breach of the contract, and recover the value of the policy at the time of the refusal. Hancock v. N. Y. L. Ins. Co., 2 Ins. Law Jour. 903; Smith v. Charter Oak L. Ins. Co., Cent. L. Jour., Feb. 12, 1874 (Mo.). After one tender and refusal it is not necessary to tender the subsequently accruing premiums. *Id.*; and Sands v. N. Y. L. Ins. Co., 50 N. Y. 625; Hamilton v. Mut. L. Ins. Co., 9 Blatch. 234; N. Y. L. Ins. Co. v. Clopton, 7 Bush, 179; Manhattan L. Ins. Co. v. Warwick, 20 Grat. 614; Statham v. N. Y. L. Ins. Co., 45 Miss. 581.]

⁴ New York Life Ins. Co. v. Clopton, 7 Bush (Ky.), 179; Sands v. New York Life Ins. Co., 59 Barb. (N. Y.) 556; Manhattan Life Ins. Co. v. Warwick, 20 Grat. (Va.) 614. And see *post*, § 350.

⁵ Ward v. Smith, 7 Wall. (U. S.) 447, 452; [N. Y. L. Ins. Co. v. Clopton, 7 Bush, 179.] In Dillard v. Manhattan Life Ins. Co., 44 Ga. 119, it was held that the insured had no right to pay the premiums to the resident agent in Georgia after the war broke out, nor he to receive; and her failure to pay them according to the stipulations of the policy prevented her recovery, not on the ground of forfeiture by reason of the failure, which the court said would be excusable, because to pay would be illegal, but because the company having contracted, if the pre-

§ 41. The Lynchburg Hose Fire Insurance Company v. Knox was a case where the company sued to recover on a premium note, and the defence was that war had abrogated the contract. But it was held that the war merely suspended the contract.¹

§ 42. In *Kershaw v. Kelsey*,² Mr. Justice Gray, after a learned and exhaustive review of the authorities upon the effect of war upon contracts between belligerents, comes to the conclusion that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries, and that this includes any act of voluntary submission to the enemy, or receiving his protection, as well as any act or contract which tends to increase his resources, and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision, and the more sweeping statements of the text-books rest upon the authority of *dicta* which are shown to be unsupported by the facts under consideration.³

minums are paid as stipulated, to pay a certain sum, the premiums not having been so made, no liability had been incurred. But this case is against the current of authorities on both points. The condition in this case was the usual one, that if the premium was not paid as stipulated the policy was to be void. In *Howell v. Gordon*, in the same State (40 Ga. 302), it is said *obiter* that the war revoked the powers of an agent in Georgia appointed by a citizen of Massachusetts to take care of certain lands in Georgia.

¹ Superior court of the city of Baltimore, reported in the *Baltimore Law Transcript*, vol. i. Oct. 24, 1868. The opinion is given *in extenso* in the first edition of this work, p. 37, note.

² 100 Mass. 561.

³ The learned judge continues: "At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint, in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war.

(s) "The trading or transmission of property or money which is prohibited

[§ 42 A. The substance of the whole matter is that public interests overrule private, but that the latter should be interfered with no further than is *necessary* for the public purposes.

The tendency of international law is to impair private concerns as little as possible by national disputes and warfare.¹ This principle evidently requires that contracts of insurance should be left intact except so far as cut down by these two principles: (1) No aid or support must go to the enemy during hostilities; (2) Citizens of this country shall not contract to indemnify citizens of another country against loss by acts of war by the United States. Such liabilities if allowed would interest our citizens in the success of the enemy. This is the common sense and justice of the matter, and the thought at the heart of the law of it, underlying and justifying the principal authorities above cited.]

by international law is from, or to, one of the countries at war. An alien enemy residing in this country may contract and sue like a citizen. When a creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there, authorized to receive the amount of the debt throughout the war, payment there to such creditor or his agent can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor; it is not made to an enemy in contemplation of international or municipal law; and it is no objection that the agent may possibly remit the money to his principal in the enemy's country; if he should do so, the offence would be imputable to him, and not to the person paying him the money." [A citizen of this country may fulfil a contract with an alien enemy during war time, by a delivery of goods to the alien enemy's U. S. agent. *Buchanan v. Curry*, 19 Johns. 137, 141. But the agent must have been appointed *before* the war. *United States v. Grossmayer*, 9 Wall. 72, 75.] [The law does not presume that a debt will be paid over to an enemy during war, even though paid to his agent. *Buchanan v. Curry*, 19 Johns. 137; *Denniston v. Imbric*, 3 Wash. C. C. 396.]

¹ [Clarke v. Morey, 10 Johns. 69; *Scholefield v. Eichelberger*, 7 Peters, 586; *Bradwell v. Weeks*, 13 Johns. 1.]

CHAPTER IV.

CONSUMMATION OF THE CONTRACT.

ANALYSIS.

1.

- §§ 43, 43 A. The contract is not complete until the parties arrive at an understanding of its terms, the proposals of one party being accepted by the other, and the risk does not attach until all conditions precedent are fulfilled. An accepted application or a renewal receipt imports an agreement to issue a policy (§ 43; see also § 44). Witness may state facts, but not his opinion that the contract was complete (§ 43 A).
- § 43 B. Terms may be fixed by past dealing.
- § 43 C. The contract may be complete without payment of premium, or giving bond to pay assessments;
- § 43 D. and in spite of mistake in the name of the vessel or of the agent as to the identity of the assured (§ 43 D), or in charging a less premium than he ought (§ 43 E).
- § 43 E. An agreement to give a policy on a certain contingency is good and enforceable when the contingency happens.

2.

- § 43 F. The contract is not complete if the minds of the parties have not met on the terms and subject-matter, as on account of writing so bad that *board* is taken for *brick*, or because the negotiations are indeterminate as to the apportionment of the insurance, the amount of premium original or additional, the company or the property to be covered, or because the necessary approval has not been given.
- § 43 G. A loss or alteration known to the assured before completion of the contract, and undisclosed, is fatal.
- § 43 H. An application and delay in acting on it is not sufficient to make a contract. The application is a mere proposal.
- § 44. "Binding-book." Unorganized company.
- §§ 45, 45 a. *Execution of Policy after loss.* If nothing remains to be done but to execute what has been agreed upon, the company is bound, though a loss happen before the policy is made. Recovery may be had on a policy issued after loss, and the unpaid premium is a credit on the amount.
- §§ 46-49. *Negotiations by Mail.* Some cases hold the contract incomplete until the letter of acceptance is *received*; but it is impossible to make any rule in the premises that shall secure a certain meeting of minds at the same moment. If the receipt is fixed upon, the

insured may change his mind between the mailing and the delivery of his acceptance. If the time of mailing governs, still the company may change their minds before that time, or even before their offer reaches the insured. A mathematically consistent solution being impossible, convenience and practicality must shape the rule, and to hold the contract completed by mailing the acceptance within a reasonable time and before notice of withdrawal is best for the despatch and definiteness of business. It saves a prolonged series of manœuvres and uncertainties that could result in no good. This is the rule adopted by the United States Supreme Court, and by the great weight of authority (Mass. ? § 43). The letter must be properly addressed and stamped (§ 48 n.).

3.

§§ 50-52. Until the parties have agreed on the terms there is no contract, even though the premium be paid or the agent of the company tell the applicant that he may hold himself insured (see § 54).

§§ 54, 54 C. Agreement with agent subject to approval of the principal.

Where the agent insures subject to disapproval, reasonable notice must be given of the disapproval (§ 54 B). An application once approved cannot be arbitrarily rejected afterward (§ 54 C).

§ 53. *Acceptance.* Unconditional or conditional with fulfilment of the condition is necessary to a complete contract. A mere mental assent indicated by no outward expression, silence even though long continued, or a letter still in the possession of the writer, are insufficient, but anything which amounts to a *manifestation* of a formal determination to accept, communicated or put in the usual and proper way to be communicated to the party making the offer, completes the contract. Indorsing shipments on the policy though required by the contract is a mere form, which the company cannot refuse after loss.

4.

§ 55. Policy may be held for payment of premium if so agreed, the applicant having the option to take or refuse the policy. In this case the contract is not complete until such choice is exercised, and payment of the premium by a stranger without knowledge of the applicant is not sufficient.

Life, Neither illness nor death of the applicant will authorize the agent to refuse to deliver the policy on tender of the premium.

§§ 55 A, 56. *Delivery and payment.* Unless made so by law or agreement, *delivery* is not a condition precedent to a complete contract (§§ 43, 55 A). But *prima facie* the contract is incomplete if there has been neither delivery of the policy nor payment of premium. On the other hand, even delivery and payment combined are not conclusive of a valid contract. Possession of the policy by the insured makes a *prima facie* case for him, subject to proof that it was not delivered to him with consent of the insurers or that it is void for fraud or error, &c. Possession by the insurers leaves the presumption with them, and the burden is on the

insured to show that the parties intended the contract to be valid without further action.

What constitutes delivery of the policy is a question of intention on the facts. No formal transfer and acceptance is necessary. The agreement on all the terms and the transmission of a policy to the agent, to be delivered without conditions or further act on the part of the insured, is equivalent to delivery (§ 60). delivery may be made by mail, but the policy must be such as the applicant is bound to accept. delivery of the policy does not waive the condition as to prepayment of the premium, § 56.

§§ 57, 58. Contract with agent, payment of premium and receipt subject to approval of company. Cases not entirely consistent. It is held that the company cannot be allowed to reject a fair contract merely because loss has intervened, and also that where a premium is paid and an application made "if not approved money to be refunded" there is no contract, but merely a proposal forwarded by the agent. It is sometimes agreed that the insurance shall be good for thirty days or until notice of disapproval.

Neglect of the agent to forward the application, or other neglect in the scope of his business will not prejudice the insured, § 58; (see also § 64).

§ 59. *Interim receipts* bind the parties by the conditions of the policy ordinarily used by the company, except as to conditions of which the insured is ignorant by fault of the company. If the receipt is broader than the policy, the former governs.

5.

§ 61. *Obligations mutual.* If the applicant may demand a policy, the company may demand the premium. This is clear on principle, though there are decisions to the contrary.

§ 62-64 A. *Charter and By-laws* (see ch. 2 and 1).
the time and manner of contract must conform to charter, § 63.
if a deposit note is required by, to complete the contract it is essential, § 63.
all who take out policies are bound by existing charter, by-laws, and statutes, § 63 n.
are notice to all dealing with the company, § 63, *e. g.*, of the powers of agents, § 63 n.
cannot be waived by the officers, § 63.
contra, in favor of one asking for by-laws when dealing with agent and not receiving them, § 62.
company may however be bound, though the charter conditions are not fulfilled before loss, § 64.
an agreement to issue a policy failing of fulfilment before loss only by neglect of the officer binds the company, § 64.
subsequent change of charter or by-law, no effect on policy unless so agreed, § 64 A.
by-law repugnant to policy is excluded, 64 A.
mutual company policy-holder becomes a *member* of the company, and is bound as such, §§ 62-64 A.

by-laws not part of contract in Massachusetts unless incorporated in full into the policy. Pub. Stats. 712.

§ 65. *Countersignature* of the agent is necessary, if required by the terms of the policy or by the charter. A waiver or equivalent of the ceremony is however possible; for example, by *delivery of the policy* without the signature, but proof of proper delivery is essential.

§§ 66, 66 A. *The place of contract*, by the law of which its validity is determined, is the location of the home office if accepted and completed there, but if countersigning by the agent is necessary, or the policy is to be delivered only on receipt of the premium, the contract is completed at the place of the agency.

§ 66 A. *Interpretation* may be governed by another law than the validity. Division of a State does not affect existing contracts.

§ 43. **Contract, when completed.** — From the extent and peculiar character of the operations of insurance companies and their agencies questions frequently arise, sometimes of great difficulty, as to the fact whether any contract has been made. Negotiations have been had, but have they resulted in a contract? This, of course, depends upon the question, whether the respective parties have come to an understanding upon all the elements of the contract, — the parties thereto; the subject-matter of insurance; the amount for which it is to be insured; the limits of the risk, including its duration in point of time, and extent in point of hazards assumed; the rate of premium; and, generally, upon all the circumstances which are peculiar to the contract and distinguish it from every other, so that nothing remains to be done but to fill up the policy and deliver it on the one hand, and pay the premium on the other. If, upon all these points, an agreement has been arrived at, and no stipulation is made that the delivery of the policy shall be the test of the consummation of the contract, and no law makes such delivery a condition precedent to its validity from that time, unless another time is fixed, the contract is complete, and binds the parties. The policy, as we have seen,¹ is not essential to its validity. It is but the form and embodiment, the expression and evidence, of what has already been agreed upon, adding nothing thereto and detracting nothing therefrom. And whether issued immediately upon the arrival at

¹ *Ante*, ch. ii.

a mutual understanding, or subsequently, before the loss or after the loss, with or without knowledge, or not issued at all, the obligations of the parties are not affected. If the insurers refuse under such circumstances to issue a policy because a loss has intervened, or any other change has taken place which would not be a defence under the policy if that had been delivered, they will not be allowed by the law to take advantage of the fact that no policy has been issued, but in divers modes, stated in another place,¹ will be compelled to recognize their obligations just as fully as if a policy had been issued. An accepted application imports an agreement to issue the policy used by the insurers in execution of the contract; and this policy, when issued, becomes the evidence of the contract.² In *Lightbody v. North American Insurance Company*, the premium having been paid and a receipt taken, it was held that insurance related back to the date of the receipt, though the policy was not delivered till some three weeks after, and after the fire.³ If the terms of the policy transmitted for delivery be changed by an authorized agent upon further negotiation with the insured, the insurance will take effect from the change, and not from the date of the policy.⁴

[§ 43 A. **The Contract is Complete** when the terms are fixed, and everything which by law or agreement was made a condition precedent to liability, has been done. All the terms must be agreed on and everything be done but filling up and delivery of the policy, on one side, and paying the premium on the other;⁵ and, as we shall see, payment of the premium is usually made a condition precedent, and delivery may be also. A slip of policy containing the terms of insurance is a binding contract, and puts the risk on the company.⁶ A contract to insure the life of the applicant for \$15,000, payable to his wife, according to the form of policy

¹ *Post*, §§ 565, 566.

² *Fuller v. Madison Mut. Ins. Co.*, 36 Wis. 599; *ante*, § 23.

³ 23 Wend. (N. Y.) 18. And see *post*, § 130.

⁴ *Gloucester Manuf. Co. v. Howard Ins. Co.*, 5 Gray (Mass.), 497.

⁵ [*People's Ins. Co. v. Paddon*, 8 Brad. 447.]

⁶ [*Thompson v. Adams*, 23 Q. B. D. 361.]

in use by the company, is sufficiently certain to be enforced.¹ It is incompetent for a witness to say that in his opinion insurance is effected and completed by the acceptance of the order.²]

[§ 43 B. *Terms fixed by Past Dealings.* — If the agreement is silent as to the rate of premium, duration of policy, or other essential matter, standing alone it is void for uncertainty, but it may be aided by past transactions between the same parties, these elements being presumed to continue the same in the new contract.³ Where F., an insurance agent, had for several years insured the property of W., each time for a year, and a new contract of insurance is made, no premium or duration of risk being specified, and the property burns before delivery of the policy, it will be presumed that the premium and duration were intended to be the same as in the past, and the minds of the parties will be held to have met in a complete contract.⁴]

[§ 43 C. *Contract may be complete without Premium, or Bond to pay Assessments.* — Where all the details of the insurance were agreed on between a broker and the company's agent, and the premium fixed, and there was evidence of a usage to give the broker credit on premiums to the end of the month, the contract was held complete.⁵ Where the plaintiff asks the agent for insurance, and he examines the property and agrees with the plaintiff as to the amount of insurance on each parcel, the preliminary survey is complete except the plaintiff's given name, the survey is handed to the secretary and approved by him, the record is made in the books of the company, the secretary's fee for the policy is paid, and the agent tells the plaintiff her insurance is all right, and the policy will be along in due time, the contract is complete although the plaintiff had not executed the bond to pay all assessments, it being customary to execute that

¹ [Hebert v. Mut. L. Ins. Co., 12 Fed. Rep. 807 (Or.), 1882, 14 Repr. 198, 8 Sawy. 198; s. c. sub nom. Herbert v. Mut. L. Ins. Co., 11 Ins. L. J. 567.]

² [Lindauer v. Delaware Ins. Co., 13 Ark. 461, 470.]

³ [Home Ins. Co. v. Adler, 71 Ala. 516.]

⁴ [Winne v. Niagara F. Ins. Co., 91 N. Y. 190.]

⁵ [Ruggles v. Am. Cent. Ins. Co., 114 N. Y. 418.]

when the policy was delivered. There is nothing doubtful about such a contract. The record on the company's books is the basis of, and substantially the same as the policy, and it is evident that the company intended to insure the plaintiff; the minds of the parties had met.^{1]}

[§ 43 D. *Contract complete in spite of Mistake in Name of Vessel, or in regard to the Identity of the Assured.* — There can be no contract of insurance, and hence no liability, where the parties' minds do not meet as to the object of insurance.² But a mere mistake in the name of the vessel is of no moment if, in fact, both parties had in mind the same ship. An instruction that if the insurance agent making a policy to J. E. Travis, at the instance of Dr. Joseph Travis, agent of J. E. Travis, supposed that the doctor was the person being insured, then the policy is not a contract with J. E. Travis, is error. If there was fraud, on the part of the insured, if he knew the mistake under which the insurer was laboring, and failed to remove his error, he could not hold the company; but where there has been no misrepresentation or suppression of truth by the insured in such a case of mistaken identity, the policy is good.^{3(a)}]

[§ 43 E. *Agreement to give a Policy on a certain Contingency good.* — An agreement to insure a cargo to be laden, if the vessel sail within a given time, which provides means for ascertaining the amount to be covered, and the rate of premium, when lading is done and the vessel's sailing day fixed, though these are contingent, is valid, and the insurers are bound to give a policy on the vessel's sailing within the given time, and the insured is bound to pay the premium accordingly; and the issuing of a policy on such an agreement, with material errors resulting from the agent's mistake, and the agent's further error in charging a less premium than is usually charged, or than he had authority

¹ [Van Loan v. Farmers' Mut. F. Ins. Co., 24 Hun, 132.]

² [Hughes v. Mercantile Mut. Ins., 55 N. Y. 265, 268.]

³ [Travis v. Peabody Ins. Co., 28 W. Va. 583, 598.]

(a) An insurance policy is not invalid because no particular person is therein named as the assured. *Weed v. Hamburg-Bremen F. Ins. Co.*, 133 N. Y. 394.

to charge, do not impair the policy, and the plaintiff may recover after deducting the balance of unpaid premium.¹

[§ 43 F. **When the Contract is not complete.** — If the minds of the parties have not met on all the essential terms there is no contract.² Where the applicant writes “board” so poorly that the company take it for “brick,” and issue a policy on a brick building, the minds of the parties did not meet.³ Where there is to be some apportionment of the insurance between mill and machinery, and what the division shall be has not been agreed on, the contract is not complete.⁴ Where an additional premium is left undetermined, and it is a condition precedent to recovery, it must be fixed and paid to make the company liable.⁵ Clifford, J., dissented to both cases on the ground that the premium was left to be fixed according “to the established rate at the time of shipping, &c.,” which was determinate, and if by the company’s fault in demanding a rate above the one indicated the premium was not paid, the company was not freed. Where the terms are decided upon by the agent and the insured, but no company designated, and no company agrees to take the risk on the said terms, there is no contract.⁶ If the agent acts for several companies, and no particular company is named in the negotiations, or fixed by prior dealings, the contract is not complete.⁷ The contract is not complete until the property to be covered has been specifically designated.⁸ When anything remains to be done before the insurance takes effect, for example, approval, it is absolutely void if that precedent condition is not performed.⁹

[§ 43 G. *Completion after Loss or Alteration undisclosed is*

¹ [Bunten v. Orient Mut. Ins. Co., 8 Bosw. 448.]

² [Bishop of C. v. Western Ass. Co., 22 N. B. R. 242.]

³ [Smith v. City of London Ins. Co., 11 Ont. R. 38, 50.]

⁴ [Kimball v. Lion Ins. Co., 17 F. Rep. 625 (R. I.), 1883.]

⁵ [Orient Mut. Ins. Co. v. Wright, 23 How. 401; Sun Mutual v. Wright, 23 How. 412, 413.]

⁶ [Sheldon v. Hekla F. Ins. Co., 65 Wis. 436.]

⁷ [New Orleans Ins. Ass. v. Boniel, 20 Fla. 815.]

⁸ [Matoon Manuf. Co. v. Oshkosh Mut. F. Ins. Co., 69 Wis. 564.]

⁹ [Winnesheik v. Holzgrafe, 53 Ill. 516. See §§ 55, 57-58.]

insufficient. — A contract not completed till after loss, and when the insured knew of the loss, is bad, although the policy is antedated.¹ If there is a material alteration between the acceptance of the proposal and the tender of the premium, the company is not bound to accept it.²

[§ 43 H. *Application, and Delay in acting on it, insufficient.* — An application is not a contract but a mere offer, or proposal, which may be rejected,³ and it cannot be converted into a contract by delay in acting upon it.⁴ An application to a mutual company was sent August 9. At the next regular meeting of the company, September 25, it was rejected. This was held a reasonable time, and the company was not accounted liable for a loss in the mean time.⁵ Silence after a proposal is not consent unless there is a duty to speak. Where the insured applied to have the policy continued in force temporarily, and received no reply, no liability of the company was created.⁶]

§ 44. "**Binding-book.**" **Unorganized Company.** — The agreement for insurance is complete when the terms thereof have been agreed upon between the parties, and the reciprocal rights and obligations of the insurer and the insured date from that moment, without reference to the execution and delivery of the policy, unless these two elements are embraced within the terms agreed upon. The contract imports an obligation on the part of the insurer to execute and deliver a policy to the insured. Thus, where a renewal receipt was taken for a policy payable to a mortgagee to the extent of his interest, and a policy was issued by mistake directly to the mortgagee as the insured, and after loss the mortgagee was paid with the assent of the mortgagor, it was held that the latter might maintain an action for the balance of

¹ [Wales v. N. Y. Bowery F. Ins. Co., 37 Minn. 106.]

² [Canning v. Farquhar, 16 Q. B. D. 727.]

³ [Covenant Mut. Ben. Ass. v. Conway, 10 Brad. 348; Rowland v. Springfield F. & M. Ins. Co., 18 Brad. 601. (The company must act promptly, however, and return the premium).]

⁴ [Heiman v. Phoenix Mut. L. Ins. Co., 17 Minn. 153.]

⁵ [Harp v. Grangers' Mut. F. Ins. Co., 49 Md. 307, 309.]

⁶ [Royal Ins. Co. v. Beatty, 119 Pa. St. 6.]

the amount insured, on the agreement for a policy as by his receipt appeared.¹ So, liability was enforced in the following somewhat anomalous case: A mutual company, whose charter provided that it might organize and proceed to business when fifty applications had been procured, and that any person might become a member by subscribing to an application and paying a certain sum stated, but that there should be no liability until fifty applicants had been obtained, having procured the requisite number, organized and voted to issue policies. Before any policy was issued the loss occurred. The directors refused to issue a policy or to recognize the claim.² And on the completion of the negotiations, the policy, executed in accordance therewith, and dated on the day of the completion, though not actually delivered till afterwards, or at all, or if antedated when executed and delivered, will take effect from its date, unless some other terms are expressly agreed upon.³ It is a customary thing for an insurance agent to bind his principal by an oral agreement, a memorandum of which he inserts in his "binding-book," so called.⁴ (a)

§ 45. Distinction between Policy and Agreement to insure.

— There is at least a technical distinction between a contract of insurance or policy and an agreement to insure. The latter may, and in point of fact does, exist prior to

¹ *Akin v. Liverpool, &c. Ins. Co., C. Ct. (Ark.), 6 Ins. L. J. 341.*

² *Van Slyke v. Trempealeau County, &c. Ins. Co. (Wis.), 9 Ins. L. J. 633.*

³ *Lightbody v. North Am. Ins. Co., 23 Wend. (N. Y.) 18; Hallock v. Commercial Ins. Co., 2 Dutch. (N. J.) 268; s. c. affirmed, 3 id. 645; Flint v. Ohio Ins. Co., 8 Ohio, 501; Xenos v. Wickham, 2 Law Repts. (H. L.) 296; American Horse Ins. Co. v. Patterson, 28 Ind. 17; Lefavour v. Insurance Co., 1 Phila. 558; Baldwin v. Chouteau Ins. Co., 56 Mo. 151; post, § 45 a.*

⁴ *Putnam v. Home Ins. Co., 123 Mass. 324; ante, §§ 22, 23.*

(a) Where, upon brokers applying for insurance from the defendant, which was agreed to, a binding slip was given until the regular policy could be made out, and later in the day the defendant sent a messenger to notify the brokers that it declined the risk, but their office being closed, the notice was duly given the next day, according to the defendant not later than half-past one, according

to the brokers about four o'clock, it was held, the fire occurring shortly after three o'clock, that the slip must be construed as if it expressed that the insurance was under the conditions of the ordinary policy. *Karelsen v. Sun Fire Office, 122 N. Y. 545. See infra, § 59; Underwood v. Greenwich Ins. Co., 161 N. Y. 413, 659; Phoenix Ins. Co. v. Hale (Ark.), 55 S. W. 486.*

the drawing up and the delivery of the policy, and contemplates the delivery of the policy as the consummation of the agreement. And upon this distinction much important and interesting litigation has arisen. It being settled that insurers may now become liable for a loss although they may not have issued a policy, the question often arises, when that liability is fixed; in other words, when the negotiations have reached such a point that if the insurers refuse to issue a policy the courts will interpose to compel them to issue one, or to indemnify the insured to the same extent and in like manner as if they had issued a policy. This interposition will usually be successfully invoked when the negotiations have reached such a point that nothing remains to be done by either party but to execute what has been agreed upon. Thus, in *Kohne v. Insurance Company of North America*,¹ the plaintiff's agent applied for insurance, and agreed upon all the terms, but left the office before the policy was filled out. This, however, was filled out within a few hours, and notice thereof given by the company, accompanied, however, by notice that the company had received information that a loss had happened. On calling for the policy and tendering the premium, the agent was refused, on the ground that a loss had happened before the delivery, and the contract was not complete. But the court held otherwise, as everything had been agreed on, and nothing remained to be done but to carry out the terms already agreed on; and the plaintiff had a verdict.²

§ 45 a. **Policy executed after Loss.** — As another practical illustration of the doctrine that where the parties have come to an agreement upon all the terms, and nothing remains but to execute what has already been agreed upon, a policy must issue, may be stated the case of *Mead v. Davidson*,³ where it appeared, in an action on a policy on a ship, "lost

¹ 1 Wash. (U. S. C. C.) 93.

² This case was trover for the policy. The amount of damages is not stated in the case as reported, but it was undoubtedly the same as if the plaintiff had sued and recovered on the policy, had it been delivered. See also *Goodall v. New England Mut. Fire Ins. Co.*, 5 Fost. (N. H.) 169.

³ 4 Ad. & Ell. 303, in the K. B.; *ante*, § 44.

or not lost," that the risk had been accepted and the premium paid before loss; but before the delivery of the policy — what was not known to either party at the time the agreement was made and the premium paid — it came to the knowledge of both parties that a loss had happened, notwithstanding which the company, recognizing their obligation under the agreement, executed and delivered a policy in accordance therewith. And the question was whether such a policy, so executed after knowledge on the part of both parties of the loss, could be upheld. Upon this point the court had no doubt. The delivery was only in execution of what the company had agreed to do upon sufficient consideration.¹ So, also, where a policy was renewed by payment of premium to an agent of the company, who gave a receipt therefor, but the general agent declined to renew, but paid the money, October 16, to the defendants, who on the same day issued a policy, based on the application to the former insurance company, covering the premises for one year from October 2d. The property was destroyed on the 13th October. The plaintiff did not know of the last transaction till he received the policy. It was held that the plaintiff might recover, there being no fraud; that the statements in the application were to be taken as of October 2d, and that the insurance was in effect "burnt or not burnt."² [Recovery may be had on a policy, issued after loss in pursuance of a prior parol agreement, and the unpaid premium is a credit on the amount recoverable on the policy.³]

§ 46. **Negotiation by Correspondence.** — When the negotiations are carried on by correspondence through the mail,

¹ *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; *Marx v. National Mar. Ins. Co.*, 25 La. An. 39; *City of Davenport v. Peoria Fire Ins. Co.*, 17 Iowa, 276; *Baldwin v. Chouteau Ins. Co.*, 56 Mo. 151; *Insurance Co. v. Colt*, 20 Wall. (U. S.) 560 — the last two cases where credit was given for the premium, which was paid after the loss, the insurers not knowing of the loss, — and *Keim v. Home Mut. Ins. Co.*, 42 Mo. 38, where the facts were similar, and the policy, delivered after the loss, provided that it should not take effect till the premium was paid.

² *Giffard v. Queen Ins. Co.*, 1 Hannay (N. B.), 432. See also *Horter v. Merchants' Mut. Ins. Co.*, 28 La. An. 730.

³ [*Home Ins. Co. v. Adler*, 71 Ala. 516.]

the precise point at which the contract becomes binding on both parties has been the subject of diverse opinions held by equally distinguished tribunals. On the one hand, it has been held that when a party applies for insurance by letter, and receives a reply stating the terms upon which the insurance can be had, to which the applicant replies accepting the terms, the contract does not become binding until the letter of acceptance is received, or, at all events, the fact of acceptance has in some way come to the knowledge of the insurers.¹

On the other hand, at about the same time the Court of King's Bench, in *Adams v. Lindsell*,² where the defendants offered, by letter, to sell the plaintiff a lot of wool upon certain terms, requesting an answer by due course of mail, to which letter the plaintiff, as soon as he received it, replied, accepting the offer, held that the contract was complete when the plaintiff mailed the letter accepting the offer, as otherwise no contract could ever be completed by the post.³

§ 47. **Contract by Letter** (*continued*). — The same question has been before the Court of Errors of New York,⁴ the Supreme Court of Pennsylvania,⁵ and the Supreme Court of the United States.⁶ In the first of these cases, the letter of acceptance, after much correspondence, was mailed before

¹ *McCulloch v. Eagle Ins. Co.*, 1 Pick. (Mass.) 270. The court cited *Cooke v. Oxley*, 3 D. & E. 653, which was a case where the defendant offered to sell tobacco to the plaintiff upon certain terms, and at the plaintiff's request gave him till a certain time to accept or reject, before the arrival of which time notice of acceptance was given, and the court held that there was no contract; and *Payne v. Cave*, 3 D. & E. 148, which was a case where the court held that a bidder at an auction had a right to withdraw his bid at any time before the hammer was down; that is, at any time before the acceptance of the bid. The doctrine of this last case is fully sustained by Pothier, *Traité du Contrat de Vente*, p. 1, § 2, art. 3, no. 32.

² 1 Barn. & Ald. 681.

³ The cases of *Payne v. Cave* and *Cooke v. Oxley*, *ubi supra*, were cited in this case by the defendants' counsel, but the court did not regard them as authoritative. During the delay which intervened between the forwarding of the offer, which by misdirection did not reach the plaintiff in the usual season, the defendants had sold the wool to another purchaser.

⁴ *Mactier v. Frith*, 6 Wend. (N. Y.) 103.

⁵ *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Barr (Pa.), 339.

⁶ *Taylor v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390.

the death of the party to whom it was addressed, but did not arrive at its destination till after the death; and the court approved and adopted the doctrine of the English case, as well upon the reason of the thing, as upon the apparent approval of the same by the Court of Common Pleas, in *Routledge v. Grant*.¹—The case in Pennsylvania was a little more complex in its facts, which were substantially as follows: The plaintiff applied to the agent of an insurance company by written application for insurance upon an academy building, agreed upon the terms, and paid the premium, and received a certificate from the agent that the property would be insured from the date of the application, if the company approved. On transmitting the papers to the company, without approving the application they wrote to the agent that the plaintiff must make certain changes; and when the company were duly certified that these requisites were complied with a policy would be sent. These requisites were complied with, and the agent duly notified thereof, and requested to call and examine for himself; which however he, from press of business, neglected to do until the building insured was burned. On a refusal by the company to pay the loss on the ground that no contract had been perfected, the court, adopting the principle of the English case, held that the contract was completed by notice given to the agent of his compliance with the requisitions of the company. He had performed that in consideration of which a policy had been promised, and he was therefore entitled to his policy. In the case in the Supreme Court of the United States, the facts were that the plaintiff applied for insurance to the company's agent, who, after communication with his principal, wrote the plaintiff stating the terms, and added, that if he wished to insure he could send his check for the premium, "and the business is concluded." This letter was delayed by misdirection; but as soon as received and before any loss, the plaintiff replied, accepting the terms, and enclosing his check. The letter of acceptance, however, did not reach the agent till the property in-

¹ 4 Bing. 653.

sured had been destroyed. In this case also it was claimed by the insurers that no contract had been completed. But the court held that the contract was complete by the acceptance transmitted in due course of mail.¹

§ 48. And the doctrine of this latter case must now be considered as the one which is supported by the great preponderance of authority, and as recommended, if not by the better reason, at least by its greater practicability, — a consideration which seems to have had controlling influence in leading to its adoption.²

¹ “If the contract,” say the court, “became complete, as we think it did, on the acceptance of the offer by the applicant, on the 21st December, 1844, the company, of course, could have no knowledge of it until the letter of acceptance reached the agent, on the 31st of the month; and, on the other hand, upon the hypothesis it was not complete until notice of the acceptance, and then became so, the applicant could have no knowledge of it at the time it took effect. In either aspect, and, indeed, in any aspect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its consummation must depend upon the act of one of them in the absence of the other.

“The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and, if the process is to be carried farther in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other.

“It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they became bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated, instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

“For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part, after an unconditional acceptance by the party to whom it is addressed?”

² *Palm v. Medina Ins. Co.*, 20 Ohio, 529, and cases cited, *post*, § 49; *Eames v. Home Ins. Co.*, 94 U. S. 621. [A contract is accepted when the letter declaring its acceptance is posted. *Dunlop v. Higgins*, 1 H. L. Cas. 381, 399; *Potter v. Sanders*, 6 Hare, 1, 9. And this is so although the letter declares in effect that the writer will not be bound until he receives an answer from the other party, with a duplicate of the contract executed by him. *Vassar v. Camp*, 14 Barb. (N. Y.) 341, 355. The letter must, however, be properly started, and must, among other things, be stamped. *Blake v. Ins. Co.*, 67 Tex. 160.]

And, indeed, it may be inferred from what fell from the court in a later case,¹ that even in Massachusetts, it is by no means certain that the case of *McCulloch v. Eagle Insurance Company* would now be followed except in a case exactly coinciding with it in its facts, the court there observing that it may well be conceded that when notice of acceptance is to be given by mail a notice actually put into the mail, especially if forwarded, and beyond the control or revocation of the party making it, may be good notice.

§ 49. **Acceptance.** — An offer of insurance by mail is, therefore, a continuing offer, and becomes binding upon acceptance, before notice of withdrawal, in due course of mail; and the unqualified acceptance by one party of the terms proposed by the other, transmitted by due course of mail, is to be regarded as closing the bargain from the time of the transmission of the acceptance. The concurrence of knowledge in point of time with the act of completion is wholly impracticable in contracts by correspondence, since the consummation must depend upon the act of one party in the absence of the other.²

But the acceptance must be within reasonable time. And where a reply would naturally be expected by the next return mail after the receipt of the offer, a delay covering the departure of one or more mails would seem to be unreasonable, and the party making the offer would have a right to presume that the offer was rejected.³

§ 50. **No Contract unless all the Terms are agreed upon.** — But it is to be carefully noted that, unless the parties have come to an agreement upon all the terms of the contract, so

¹ *Thayer v. Middlesex Mut. Fire Ins. Co.*, 10 Pick. (Mass.) 326, 332. In *British and Am. Tel. Co. v. Colson*, L. R. 6 Ex. 108, it was held that if the acceptance was never received there was no contract. But this is hardly consistent with still later authorities. See *Harris's Case*, *In re Imperial Land Co.*, L. R. 7 Ch. 587. See also 2 Kent, Com. *477, 12th ed.; 5 Alb. L. J. 272.

² *Western v. Genessee Mut. Ins. Co.*, 2 Kernan (N. Y.), 258; *Hallock v. Com. Ins. Co.*, 2 Dutch. (N. J.) 268; s. c. affirmed, 3 id. 645; *Duncan v. Topham*, 8 C. B. 225. In the last case the letter of acceptance never reached its destination.

³ *Thayer v. Middlesex Mut. Fire Ins. Co.*, 10 Pick. (Mass.) 326. See also *Insurance Co. v. Johnson*, 23 Pa. St. 72; *post*, §§ 53, 56.

that so far as the terms are concerned nothing remains open, and nothing remains to be done but to execute what has been agreed upon, the contract is still incomplete, and of no binding force upon either party, even though the secretary of the company inform the applicant that he may "hold himself insured,"¹ or part of the premium be accepted.² An offer by one party imposes no obligation upon another until accepted by him according to the terms in which the offer is made. The offer must be accepted as it is. If not, and any qualification of or departure from its terms is made, it must be referred back to the party making the original offer for his acceptance of the qualification before he can be bound.³ Hence, when the defendant offered to purchase flour at a certain price, and required the answer to be sent to a certain place, an answer accepting the offer, but addressed to the defendant at another place than that by him designated, was held not to be an acceptance which would bind the defendant, although the defendant received it. The terms of the offer had not been complied with.⁴

§ 51. And to the same effect is the following case: On the 18th day of the month the plaintiff wrote to the defendant that he would sell him oil-cake at a certain price. On the 19th the defendant replied that he would take a certain amount, "but it must be put on board directly." On the 22d of the same month the plaintiff replied, "I shall ship tomorrow." This last letter never reached the applicant. Upon the facts, the court held that "directly" meant, in point of time, something less than "within a reasonable time," and that an acceptance which might have been made on the 20th, made and posted on the 22d, coupled with a day's further delay in shipping, was not an acceptance according to the terms of the defendant's offer.⁵ So where

¹ *Christie v. North British Ins. Co.*, 3 Ct. of Sess. Cas. (Scotch) 519.

² *Piedmont, &c. Life Ins. Co. v. Ewing*, 92 U. S. 377; *Patterson v. Ben Franklin Ins. Co. (Pa.)*, 5 Ins. L. J. 376, 377.

³ *Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. (N. Y.) 527; *Mut. Life Ins. Co. v. Young*, 23 Wall. (U. S.) 85-106.

⁴ *Eliason v. Henshaw*, 4 Wheat. (U. S.) 225, 228; *post*, § 54.

⁵ *Duncan v. Topham*, 8 C. B. 225.

a proposal was made for insurance, in which the rate of premium was not fixed, and the company transmitted to their agent a letter accepting the proposal, and stating that a policy would be issued on the payment of a certain premium, which letter, however, owing to an unfavorable change in the health of the applicant, the agent did not make known to him, it was held that the terms of the contract were never agreed upon, the rate of premium not having been stated and accepted.¹ So, if no time is agreed upon.² The time, however, will be inferred from slight circumstances.³ So, where there is a misapprehension as to the property insured,⁴ or as to the paper referred to as containing the description of the property.⁵

So, where the insured agrees to take the policy at any rate of premium fixed by the company, and the agent forwards the application and fixes the rate of premium which he thinks the principal should accept; but the principal, opposing the application, fixes a larger rate, with the right of the applicant to decline, and forwards the policy to the agent, which, through his neglect, is lost, and not brought to the notice of the applicant till after a loss, the contract was held incomplete, as the parties had come to no understanding as to the rate of premium.⁶ So if the insured keeps the matter open to see if the policy is in accordance with the agreement, where premium was to be paid or policy returned.⁷

§ 52. So, where an action was brought for the recovery of a premium note given by the defendant, on a policy executed by the company, and the question was, whether the policy corresponded with the previous agreement, so that the defendant was bound to accept it. It appeared that Carrington

¹ *Wemyss v. Med. Ins. & Gen. Life Ins. Soc.*, 11 Ct. of Sess. Cas. (Scotch) 2d series, 151, 345; s. c. 20 Scotch Jur. 534; *Piedmont, &c. Ins. Co. v. Ewing*, 92 U. S. 377; *Christie v. North British Ins. Co.*, 3 Ct. of Sess. Cas. (Scotch) 519. See also *Neville v. Mer. & Manuf. Ins. Co.*, 19 Ohio, 452; *post*, §§ 56, 57.

² *Strohn v. Hartford Fire Ins. Co.*, 37 Wis. 625.

³ *Eames v. Home Ins. Co.*, 94 U. S. 621.

⁴ *Goddard v. Monitor Mut. Fire Ins. Co.*, 108 Mass. 56, 57.

⁵ *Le Roy v. Market Fire Ins. Co.*, 45 N. Y. 80.

⁶ *Wallingford v. Home Mut. Fire & Mar. Ins. Co.*, 30 Mo. 46.

⁷ *Rogers v. Charter Oak Life Ins. Co.*, 41 Conn. 97.

ton wrote to the company to inquire upon what terms they would make an insurance "on twenty-six horses and twenty oxen, on board the brig 'Gleaner,' from Saybrook to the West Indies," saying nothing as to the valuation of the property, or the sum he desired to be insured. The company replied in these words: "The office will take the risk at fifteen per cent, or at ten per cent with a warranty that the property was safe on the 7th of December last, but no partial loss is to be paid under ten per cent." By the mail of the next day Carrington replied, "We accept your terms with a policy filled, on twenty-six horses valued at \$2,200, and on twenty oxen, valued at \$800," and in this letter enclosed the premium note. The company, on the following day, forwarded by mail a policy "for \$3,000 on stock, on the deck of the brig 'Gleaner,'" with this note in the margin, "Forty-six head of horses and oxen, valued at \$3,000." This policy the defendant refused to accept, and immediately returned it to the company. The ground of this refusal was, that the horses and oxen were included in one *gross valuation*, instead of being *separately* valued, according to the terms in which he had accepted the offer. In delivering the judgment of the court, and commenting on the defendant's second letter, Chief Justice Hosmer said: "This was a *new* proposal, which Carrington might presume the company would accept, but could not know it. The office had assumed no such obligation, as the office had not agreed to underwrite a valued policy; neither had the defendant agreed to receive an open policy. The minds of the parties had not met. It would be plainly an unjustifiable stress upon the first words of the letter 'we accept,' to consider this expression as concluding the contract. The underwriters, by the valued policy which they transmitted, recognized the new proposal in part, and if they had attended to their import, the same words would have convinced them that a separate valuation of the horses and oxen was proposed. The policy transmitted was not conformable to the proposition. The parties never did agree."¹

¹ Ocean Ins. Co. v. Carrington, 3 Conn. 357.

§ 53. **Acceptance.** — Where the proposition is by letter, the usual mode of acceptance is by letter announcing the acceptance. When it is made by a messenger, a determination to accept returned through him, or by another, would seem to be all the law requires. But there are other modes of acceptance equally conclusive upon the parties. Anything that amounts to a manifestation of a formal determination to accept, communicated, or put in the proper way to be communicated, to the party making the offer, would doubtless complete the contract. An acceptance is the distinct act of one party to the contract, as much as the offer is of the other. What will constitute an acceptance depends in a great measure upon the circumstances of the case. It seems that the charging up to himself in his monthly account, by an agent, of the premium fixed by his principals, in a policy sent by them to him on his own property, would be a sufficient acceptance, as nothing more would naturally be contemplated.¹ But a mere mental assent, not indicated by any outward expression, has nowhere been held to be sufficient. Nor is mere silence or neglect to respond sufficient, even when the applicant, having done all that is required of him, is to receive his policy if the directors approve, or a return of the premium paid if they do not. And this is so although neither the money is refunded nor a reply made within six months.² And a letter of acceptance written, but still in the possession of the writer, or under his control, would not probably be regarded as anything more than a mere mental assent. The unpublished or undelivered letter would perhaps be considered as but little better as matter of evidence than the unspoken intent. What seems to be necessary is, that the acceptance should be manifested by some act which is open to the observation of others, and of such a character as naturally to give rise to the presumption of acceptance, in contradistinction to an equivocal act, which might, or might not, be connected with

¹ *Lungstrass v. German Ins. Co.*, 48 Mo. 201.

² *New York Union Mut. Ins. Co. v. Johnson*, 23 Pa. St. 72; *Myers v. Keystone Mut. Life Ins. Co.*, 27 id. 268. See also *post*, §§ 54, 58.

an acceptance, but would not naturally suggest it. The observation of the late Mr. Chief Justice Gibson in *Hamilton v. Lycoming Mutual Insurance Company*,¹ that an actual concurrence of assent at any particular moment is the ruling circumstance, must be taken with the qualification that the assent, though not brought to the knowledge of the other party, must have taken some outward form of expression. Nothing further than this was called for by the case. The meeting of two minds, the *aggregatio mentium* necessary to the constitution of every contract, must take place *eo instanti* with the doing of any overt act intended to signify to the other party the acceptance of the proposition, without regard to when that act comes to the knowledge of the other party. The overt act may vary with the form and nature of the contract. It may be by the fall of the hammer, by words spoken, by letter, by telegraph, by remitting the article sent for, by mutual signing, or by delivery of papers; and the delivery may be by any act intended to signify that the instrument shall have a present vitality. Whatever the form, the act done is the irrevocable evidence of the *aggregatio mentium*; and at that instant the bargain is struck. The acceptor can no more overtake and countermand by telegraph his letter mailed, than he can his words of acceptance after they have issued from his lips on their way to the hearer.²

[A provision in a policy that the agent has no power to modify the contract, refers to the policies after they have become executed between the parties; and where A. took out a life policy, giving his note for the premium, on condition that if a satisfactory surrender of other policies could not be effected A. could return the last policy to the agent and demand his note, it was held that, as there was only a conditional acceptance of the policy by A., and not an absolute one, he could demand his note on the non-fulfilment of the condition. Even if the agent had no right to make a conditional delivery, still the full acceptance necessary to a

¹ 5 Barr (Pa.), 339.

² *Hallock v. Com. Ins. Co.*, 2 Dutch. (N. J.) 268; s. c. 3 id. 645.

complete contract was lacking.¹ There was an open policy on goods, "lost or not, on board of any steamer, at and from New York to New Orleans, all sums placed at risk under this policy to be indorsed thereon." The assured shipped goods, but before he could, acting with reasonable diligence, inform the company, the goods were lost, and the company refused to indorse the amount. It was held, however, that the company was liable; the indorsement was not necessary to *create* liability, but was a form which the company could not refuse when the insured acted in good faith and with proper diligence.²

§ 54. **Agreement with Agent subject to Approval of Principal.** — If an agent agrees with the applicant upon the terms of insurance subject to the approval of his principal, and his principal returns a policy containing a modification of the terms, which the agent forwards to the applicant, with a request that he will return it if he does not comply with the terms, and the applicant neither returns the policy nor complies with the modified terms, — the payment of additional cash premiums, — the delivery is only conditional, and the contract is not complete till the compliance with the new terms.³ So, where all the terms are agreed upon, and the assured is told that he may regard himself as insured, but pending the issue of the policy the assured notifies the insurers that he desires a change, the particulars of which he does not state, and neglects to attend to the modification, though requested, and notified by the insurers that unless he call and make known the desired change they will not be held responsible, the contract is still incomplete.⁴ And the plaintiff will be in no better position if he inquire for his policy, and being told by the agent that he could not tell whether he had received it or not, but thought he delivered it to the plaintiff, neglects further inquiry. He must accept

¹ [Harnickell v. N. Y. L. Ins. Co., 111 N. Y. 390.]

² [Carver Co. v. Manf's Ins. Co., 6 Gray (Mass.), 214, 219.]

³ Myers v. Keystone Mut. Life Ins. Co., 27 Pa. St. 268; Mut. Life Ins. Co. v. Young, 23 Wall. (U. S.) 85, 106.

⁴ Sandford v. Trust Fire Ins. Co., 11 Paige (N. Y. Ch.), 547; *ante*, § 50.

the contract as modified, or there is no contract, and the negligence of the agent will not excuse his non-acceptance.¹

[§ 54 A. **Contract subject to Approval.** — Where an application provides that a policy is to take effect on the day the application is approved, and it is never approved, there is no contract.² An application and premium sent to the company on approval but never received by it, nothing more being done, constitute no contract.³ "Approval" means approval by the home office. If an application is sent on approval, a lapse of eighteen days without word from the company will not authorize the conclusion that the risk is accepted.⁴ Where a policy is given by the agent to a third party until he could learn if the company would accept the risk, there is no delivery or consummation of contract.⁵ Where an agent agreed to write a policy to take effect at a given time, but remarked that he did not know whether his company would carry the risk after he had written and reported it to them, and he never wrote or reported it, the company was held to pay for a loss. It was the agent's duty to have reported the risk, and the agreement would have held until notice from the company to cancel it. Such being the law, the neglect of the agent to write the policy cannot make the company's liability any less than it would have been if the agent had done his duty.⁶

[§ 54 B. *When the Company must give Notice of Disapproval.* — Where the insured receives a "binding-slip" or memorandum that a policy will be issued to him, the company if it concludes not to write the risk must give reasonable notice, and a notice at noon of the day on which a fire occurs at three o'clock is not reasonable, as sufficient time had not elapsed in which to obtain new insurance.⁷ If a

¹ Wallingford v. Home Mut. Fire Ins. Co., 30 Mo. 46.

² [Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 516; Pickett v. Insurance Co., 39 Kans. 697.]

³ [Atkinson v. Hawkeye Ins. Co., 71 Ia. 340.]

⁴ [Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 516.]

⁵ [Brown v. Amer. Central Ins. Co., 70 Ia. 390.]

⁶ [Campbell v. Amer. F. Ins. Co., 73 Wis. 100, 107.]

⁷ [Lipman v. Niagara F. Ins. Co., 48 Hun, 503.]

policy is negotiated through several parties, and is delivered to B. by the insurance agent conditionally, that is, subject to approval of the company, and B. delivers to C. and C. to the insured without naming any condition, and the premises burn before actual notice to the insured that the company disapproves and cancels the policy, the company is liable for the loss.^{1]}

[§ 54 C. *Application once approved cannot be rejected by Company because of Loss before Policy.* — If an application sent on approval is actually accepted by the company, at its home office, though no notice of acceptance is given to the insured, and afterward rejected only because the premises burned before a policy was made out, the company is bound, and this question of fact is for the jury.^{2]}

§ 55. **Agreement with Agent; Payment of Premium.** — And although the policy be made out and forwarded to the agent to be delivered to the applicant on payment of the premium, the applicant, by an understanding with the agent, having still the option to take or reject the policy, as it still remains for the applicant to declare his option and pay the premium, he will not be entitled to a delivery thereof until such a payment. And if, on being called upon by the agent and tendered the policy on payment of the premium, he refers him to a third person, who, he says, will pay the premium, and the agent agrees to call upon that person, this is not the equivalent of payment. Perhaps it would be otherwise if the third person had agreed to pay the premium.³ Such a case is to be distinguished from those where the party claiming the policy has done everything which is required of him. There the policy is held merely as a deposit, and for delivery; while here it is held for payment of the premium. And if the option be not exercised till after loss, it will then be too late, as then there is nothing to which the risk can attach.⁴ Payment by a stranger without the

¹ [Hodge v. Security Ins. Co., 33 Hun, 583.]

² [Welsh v. Continental Ins. Co., 47 Hun, 598.]

³ Hoyt v. Mutual Benefit Life Ins. Co., 98 Mass. 539.

⁴ Bradley v. Potomac Fire Ins. Co., 32 Md. 108.

knowledge of the applicant binds neither the applicant nor the insurer.¹ But if the policy be held merely for delivery on payment of the premium, the agent has no right to refuse to deliver on tender of the premium, unless his authority is limited to delivery to applicants still in good health, although the applicant be dangerously ill at the time of the tender of the premium.² So where a wife applied to an agent for a policy on the life of her husband, and, in accordance with the company's rules, paid fifty dollars, which was to be applied to the first year's premium if the risk was taken, and a policy was made out and sent to the agent for delivery but not delivered, it was held that a tender of the balance of the first year's premium after the death of the insured gave a valid claim upon the company for the amount insured.³

[§ 55 A. **Delivery not essential unless so Agreed.** — A policy may be binding although never delivered between the parties.⁴ (a) Everything depends on the intention of the

¹ Whiting v. Mass. Mut. Life Ins. Co. (Mass.), 11 Reprtr. 13.

² Schwartz v. Germania Life Ins. Co., 18 Minn. 448; s. c. 21 id. 215.

³ Cooper v. Pacific Mut. Life Ins. Co., 7 Nev. 116; Fried v. Royal Ins. Co. of Liverpool, 47 Barb. (N. Y.) 127; s. c. 50 N. Y. 243.

⁴ [Loring v. Proctor, 26 Me. 18, 29.]

(a) The insurer's unconditional written acceptance of an application for life insurance consummates the contract, if actual delivery to the insured is not expressly stipulated for; and the unconditional sending and delivery of the policy to the insurance agent, who retains it, amounts to a delivery to the insured, although the policy purports to make actual delivery to the insured essential to its validity. New York Life Ins. Co. v. Babcock, 104 Ga. 67; Phoenix Ass. Co. v. McAnthur, 116 Ala. 659. See Conn. Ind. Ass'n v. Grogan (Ky.), 28 Ins. L. J. 1031; Shackelford v. Knights of Damon, 98 Ga. 295. This is true whenever the applicant's right to the possession of the policy is complete, though it may not be actually delivered by the agent until after the death of the insured. Mutual Life Ins.

Co. of New York v. Thomson, 94 Ky. 253; Machine Co. v. Ins. Co., 50 Ohio St. 549; 22 L. R. A. 768, and note. There must, however, be clear evidence that the application has been accepted, and if the applicant dies before such acceptance, the insurer is not liable. Steinle v. New York Life Ins. Co., 81 Fed. Rep. 489; Oliver v. Mut. L. Ins. Co., 97 Va. 134. A policy is delivered when deposited in the post-office by the insurer, directed to the insured at his place of residence. Triple Link Mut. Ind. Ass'n v. Williams (Ala.), 26 So. 19; Galloway v. Standard F. Ins. Co., 31 S. E. 969; Hartford S. B. & Ins. Co. v. Lasher Stocking Co., 66 Vt. 439. In general, possession of the policy by the insured, or by the beneficiary, is *prima facie* proof of delivery. Ibid.; Mass. Benefit Life Ass'n v. Sibley, 158 Ill.

parties. They may agree that the evidence of their contract shall remain in the hands of one or the other party or a third person, as they choose. An agreement to pay the premium is a sufficient consideration to make an agreement to insure valid, although the property is destroyed before delivery of the policy.¹ When a policy of fire insurance has in fact been executed and notice of such execution been given the assured, its actual delivery is not essential to the completion of the contract.² Delivery of the policy may be made essential by a provision in it.³

§ 56. **Contract prima facie incomplete if no Delivery and no Payment of Premium.** — If there has been no payment of the premium, and no delivery in fact of the policy, the contract is, *prima facie*, incomplete, and he who claims under it must show that it was the intention of the parties that it should be operative notwithstanding these facts.⁴ The presumption

¹ [Filt v. Fire Ins. Ass., 20 Fed. Rep. 766, 2d Cir. (Vt.) 1884.]

² [Bragdon v. Appleton Mut. F. Ins. Co., 42 Me. 259, 262; citing Kahne v. Ins. Co. of N. A., 1 Wash. C. C. R. 93.]

³ [Misselhorn v. Mut. Reserve Fund L. Ass., 30 Fed. Rep. 545 (Mo.), 1887; Kohen v. Mut. Reserve Fund L. Ass., 28 Fed. Rep. 705 (Mo.).]

⁴ [When there is nothing to show any transfer of the manual possession of the policy, the contract is *prima facie* incomplete, and the burden is on him who asserts it to show that the real intention and understanding was to pass the

411; Kendrick v. Mutual Benefit L. Ins. Co., 124 N. C. 315. Where the insurance agent testified that he had ordered the policy on his own responsibility and simply handed it to the insured, telling him that, if he accepted it, he should sign his name to it and send a check for the premiums, otherwise to return it, and no premium was ever paid, and the policy was found among the papers of the insured, it was held that subsequent statements of the agent to other parties that he had insured the deceased were admissible to contradict the agent's evidence that the policy was never delivered to the insured as a binding contract; that the finding of the policy among the papers of insured was evidence for the jury as to a valid delivery; and that the deliv-

ery of a policy on the promise of a future payment of premium was a waiver of premium payment in cash, in the absence of a provision making such payment a condition precedent. Jones v. New York Life Ins. Co., 168 Mass. 245. The presumption is against a completed contract when the policy has not been delivered, and no premium has been paid. Equitable L. Ass. Society v. McElroy, 83 Fed. Rep. 631; Modern Woodmen Acc. Ass'n v. Rhine, 50 Neb. 345; Easley v. New Zealand Ins. Co. (Idaho), 27 Ins. L. J. 289; Hawley v. Michigan Mut. L. Ins. Co., 92 Iowa, 593; Dailey v. Preferred Masonic Mut. Acc. Ass'n, 102 Mich. 289; Weinfeld v. Mutual Reserve L. Ass'n, 53 Fed. Rep. 208.

of law is, that the delivery of the policy and the payment of the premium are dependent upon each other. But this presumption may be rebutted by showing a waiver of the payment, or such other facts as go to show the intention and understanding of both parties that the policy shall be valid as if delivered, notwithstanding the non-payment of the premium.¹ An actual delivery, obtained by misrepresentation, is no delivery to give effect to the contract. The mere manual possession of the policy is of little consequence, whether it be in the hands of the insurers or the insured. Its possession by the insured makes a *prima facie* case for him, subject to be met by proof that it was never delivered with the consent of the insurers; while its possession by the insurers makes a *prima facie* case for them, subject to be met by proof that, though not transferred, it was intended by the parties to be a valid contract, without further action by either, and so in legal contemplation there was a delivery.²

(s) In *Markey v. Mutual Benefit Life Insurance Company*,³ there had been an actual manual possession of the policy by the assured, but under such circumstances that in the opinion of the court it was for inspection only, according to the intention and understanding of both parties, it having been returned to the agent, who, it was understood, would call upon a third party, referred to by the insured, to see if he would pay the premium. In *Collins v. Insurance Company of Philadelphia*,⁴ the policy was sent to the agent for de-

legal title and possession of the policy, without, or before the payment of the premium, and without delivery in fact. *Heiman v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 153, 159.]

¹ *Faunce v. State Mut. Life Assurance Co.*, 101 Mass. 279; *Heiman v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 153; *Giddings v. North Western Mut. Life Ins. Co.* (Sup. Ct. U. S.), 10 Ins. L. J. 39; *De Camp v. New Jersey Mut. Life Ins. Co.* (C. Ct. N. Y.), 3 Ins. L. J. 89; *Cooper v. Pacific Mut. Life Ins. Co.*, 7 Nev. 116; *Myers v. Liverpool, &c. Ins. Co.*, 121 Mass. 338; *Dinning v. Phoenix Insurance Co.*, 68 Ill. 414, 415; *City Insurance Co. v. Zoller (Pa.)*, 4 Ins. L. J. 480; *Berthoud v. Atlantic Fire Insurance Co.*, 13 La. 539; *post*, §§ 134, 191, 360, 501.

² See also § 45 *a*, and cases there cited. *Davis v. Mass. Mut. Life Ins. Co.*, 13 Blatch. C. Ct. 462.

³ 103 Mass. 78.

⁴ 7 Phila. Rep. 201. See also *Kidder v. Travellers' Ins. Co.* (N. Y. Sup. Ct.), 6 Alb. L. J. 127.

livery, on payment of the premium, which, however, was neither tendered, though requested, before the death, nor was there any waiver of the payment. In *St. Louis Mutual Life Insurance Company v. Kennedy*,¹ the applicant forwarded with his application one note due in one year from the date of the application, and one note, being for the amount of the cash premium, payable on the delivery of the policy. It was a mere memorandum of the cash premium, and it was understood by the parties that, while the payment of the premium in cash would make the insurance take effect from that date, the promise, by this note, to pay it when the policy should be delivered, would have the effect to keep the contract open until delivery on the one hand, and the payment of the premium on the other. And it was said that even if the note was presumptively to be taken as in place of the cash premium, parol testimony going to show that it was not so regarded by the parties was admissible to rebut the presumption. In *Faunce v. State Mutual Life Insurance Company*,² the new policy was deliverable as a substitute for and upon surrender of a prior policy, which surrender was never made or tendered, but, on the contrary, enforced and paid by the company. In *Bidwell v. St. Louis Floating Dock and Insurance Company*,³ the insured was to execute his note to the company with the indorser, which was never done. [If the policy is not to go into effect until the premium is paid, delivery of the policy does not waive this provision, and if the policy states that waiver of its terms must be in writing, even an agreement by the agent to waive the payment of the premium as a condition precedent would be of no avail.⁴]

(t) Even the delivery of the policy and the payment of the premium are not conclusive of a valid policy. There may have been a failure to agree,—a want of that *aggregatio mentium* which is necessary to the completion of the con-

¹ 6 Bush (Ky.), 450.

² 101 Mass. 279.

³ 40 Mo. 42.

⁴ [Pottsville Mut. F. Ins. Co. v. Minnequa Springs Imp. Co., 100 Pa. St. 137.]

tract. Thus, where insurance is procured upon what is described as a machine-shop, but is in reality an organ factory, the description being given by one who applied in the owner's name, a policy issued upon such application will not cover the organ factory, although the owner may have received it and paid the premium, and the representation was made without his knowledge.¹

§ 57. **Acceptance subject to Approval; Interim Receipt.** — But a company which has informed its agent that they will be liable for a loss after the payment of the premium to him, and pending its receipt by them, subject, however, to their right to reject the risk, if from the rate of premium or otherwise it be not satisfactory, will not be allowed arbitrarily to reject it and refuse a policy, or to reject it merely because a fire has intervened.² Nor will the agent's neglect to forward the application release the insurers.³

(s) So, where an agent is merely authorized to receive and forward applications on which the company are to issue policies, if approved, as of the date of the application. And this rule was applied where the loss occurred before the company had received, or, in due course of mail, would regularly receive, the application and premium forwarded by their agent, and therefore had no opportunity to disapprove; and where there was no agreement for intermediate insurance, except what is to be inferred from the fact that if approved the policy was to bear the date of the application. The contract was held to be consummated on the day when the premium was paid; and it was said that the reservation of the right of approval did not give to the insurers the arbitrary right to set aside any contract, however fair, made by their agent, but only in cases where the agent had been imposed upon, or where the contract made by the agent would operate as a fraud upon the right of the company.⁴

¹ *Goddard v. Monitor Ins. Co.*, 108 Mass. 57. And see *post*, § 566.

² *Perkins v. Washington Ins. Co.*, 4 Cowen (N. Y.), 645; *Insurance Co. v. Webster*, 6 Wall. (U. S.) 129. See also *Moore v. Woolsey*, 4 El. & B. 243; *post*, § 496.

³ *Fish v. Cottenet*, 5 Hand. (N. Y.) 538. And see *post*, § 69.

⁴ *Palm v. Medina Ins. Co.*, 20 Ohio, 529.

§ 58. The cases, however, upon the effect of a failure to disapprove are not entirely consistent. Thus, in a late case in Pennsylvania, the agent was authorized to receive and forward applications, the insurance to take effect on all approvable applications the day they were taken. The agent gave a receipt for the premium, and forwarded the same with the application to the company, "if not approved by directors, money to be refunded." It appeared, however, that no notice was taken of the application by the company, nor was the money refunded; and in point of fact the company denied that they ever received the application or the premium. Upon these facts it was held that there was no contract to insure, but simply a proposal forwarded by the agent; and delay under such circumstances to forward a policy or refund the money, even if the company received the application, was rather ground for inference that they rejected than accepted the proposal. A proposal not answered remains a proposal for a reasonable time, and then is regarded as withdrawn. It is only a delay or neglect that has a tendency to mislead, and which is incompatible with honesty, which can be alleged as a ground of liability; as where one knows that another is acting as his agent in a particular matter without or beyond his authority, and does not promptly disavow his acts.¹ In such cases, if the agent neglects to forward the proposal, the company will be liable for the agent's neglect.² For a stronger reason, there will be no contract if it be agreed that, if no notice of approval or disapproval be given, the insurance shall cease in thirty days. Thus, a receipt setting forth that the insurance shall cease on notice of disapproval of the application; that it shall be good for thirty days, unless sooner determined by notice; and that if no notice of approval or disapproval be

¹ Insurance Co. v. Johnson 23 Pa. St. 72, Woodward, J., dissenting; Hallock v. Insurance Co., 26 N. J. L. 263; Alabama Gold Life Ins. Co. v. Mayes (Ala.), 9 Repr. 75. And see also Myers v. Keystone Mut. Life Ins. Co., 27 Pa. St. 268; Bennett v. City Ins. Co., 115 Mass. 241. In Medina Ins. Co. v. Palm, 5 Ohio St. 107, the court intimate that the decision in Palm v. Medina Ins. Co. (*ante*, § 57) is not entirely satisfactory.

² Walker v. Farmers' Ins Co., 51 Iowa, 679; *post*, § 64.

given it shall cease in thirty days, has no binding force after the expiration of thirty days, there being no notice of approval or disapproval.¹ On the other hand, it has been held that, where a general agent gave a receipt for the premium, setting forth that if the application was approved a policy was to be furnished in thirty days, or, if the application was declined, the premium was to be returned on demand and return of the receipt, and that no liability was to be incurred unless the risk was approved and a policy issued at the home office, and the policy was sent to the agent within thirty days, but before delivery the applicant died, the receipt did not operate as a present insurance, either for the thirty days or till a policy was issued.²

(s) In an English case the facts were that the plaintiff, through an agent, insured in a certain office. The agent then left the service of this office, and became agent for another. The plaintiff, not knowing the fact, on application for further insurance, received from the agent a receipt for a certain sum of money deposited in part payment of premium and duty, in consideration of which the property was to be insured for one month, or until notice that the proposal was declined, pending the negotiations on behalf of the new company. Upon the plaintiff's observing this, he wrote to the agent that he knew nothing of the new company, and wished to be satisfied of its standing before giving them all the sums. Before any policy was made out the fire happened. Amongst other grounds of defence was this, that when the plaintiff first received his receipt he supposed he was contracting with the first company, and therefore there was no agreement with the second. But the court said that when the receipt was given the contract was complete, there being no repudiation by the plaintiff, and that the defence set up on the other ground was contemptible and ridiculous.³ And so the company was held to be bound under the following state of facts: The plaintiff applied to the

¹ *Barr v. Insurance Co. of North America*, 61 Ind. 488.

² *Marks v. Hope Mut. Ins. Co.*, 117 Mass. 528.

³ *Mackie v. European Ins. Co.*, 21 Law Times, N. s. 102.

agents of the defendants to effect an insurance on certain buildings. The agent accepted the risk, and gave to the plaintiff the usual interim receipt, which stated "the said party and property to be considered insured until otherwise notified, either by notice mailed from the head office, or by me, to the insurer's address within one month from the date hereof, when, if declined, this receipt shall become void and be surrendered. N. B. — Should applicant not receive a policy in conformity with his application within twenty days from the date hereof, he must communicate with the secretary direct, as after one month from this date the receipt becomes void." The agent omitted to transmit the application to the company, and the plaintiff, not having been notified, applied personally to the agent, who stated such an occurrence was not unfrequent, and by way of satisfying the plaintiff granted a fresh interim receipt, repeating this on four several occasions. It was held (1) that such renewed interim receipts were valueless, there being in fact no new insurance effected; (2) that the neglect of the agent to do his duty by forwarding the application to the company, could not operate to the prejudice of the plaintiff; and (3) that the mere lapse of a month without any notice to the assured did not render the receipt void, but the stipulation gave the company a month during which to consider the application, and enabled them to terminate the risk within that period; but in such a case, if the company does not intimate an intention of terminating the risk, then there is a contract for insurance for the year binding on the company, on the same terms and conditions as the ordinary policies of the company.¹

§ 59. **Interim Receipts.** — Both insurer and insured under an interim receipt are bound by the conditions of the policy ordinarily issued by the company; as, for instance, the insured, to give notice of a change of title to the insured property, and the insurer, bound till he gives notice to the contrary, must give ten days' notice, if such are the require-

¹ *Hawke v. Niagara District Mut. Fire Ins. Co.*, 23 U. C. (Ch.) 139. See also *Patterson v. Royal Ins. Co.*, 14 id. 169.

ments of the policy.¹ But where insurance was obtained for one month, and a receipt taken, setting forth that the insurance was subject to the conditions contained in the ordinary policies of the company, and a policy, though requested, was refused, on the ground that it was not usual for so short a term, it was held that the insurer was not bound by a condition which he had never seen, requiring notice of, and indorsement of consent to, subsequent insurance.² If an agent forwards an application, which distinctly states that only the home officers have authority to determine whether a policy shall issue, his receipt for the premium, setting forth that it is binding on the insurers till the policy is received, is not binding after the insurers give notice that they reject the application.³ If the receipt covers goods not covered by the policy subsequently issued, the contract may be enforced according to the terms of the receipt.⁴

Agents not unfrequently make minutes of their contracts in what are called "binding-books," and in this way may bind several companies to one insured, each for its proportion of the total insurance required; and this though the insurance be placed at the discretion of the agent, the insured not knowing where or how much is severally placed.⁵

§ 60. **What constitutes Delivery of Policy.** — To constitute a delivery of a policy, it is not necessary that there should be an actual manual transfer from one party to the other. The agreement upon all the terms, and the issue and transmission to the agent of a policy in accordance therewith, for delivery without conditions, is tantamount to a delivery to the insured.⁶ *A fortiori* if it be delivered by the agent to

¹ *Grant v. Reliance Ins. Co.*, 44 U. C. (Q. B.) 229; *Hawke v. Niagara District Mut. Fire Ins. Co.*, 23 U. C. (Ch.) 139; *Home Ins. Co. v. Favorite*, 46 Ill. 263; *Gauthier v. Waterloo Ins. Co.*, 44 U. C. (Q. B.) 490.

² *Lafleur v. Citizens' Ins. Co.*, Q. B. 22 L. C. Jur. 247; *Wooddy v. Old Dominion Ins. Co. (Va.)*, 9 Ins. L. J. 276. See also *ante*, §§ 21, 23.

³ *Cotton, &c. Life Ins. Co. v. Scurry*, 50 Ga. 48.

⁴ *Wyld v. Liverpool, &c. Ins. Co.*, 23 U. C. (Ch.) 442.

⁵ *Ellis v. Albany City Fire Ins. Co.*, 50 N. Y. 402; s. c. 4 Lans. 443; *Putnam v. Home Ins. Co.*, 123 Mass. 324.

⁶ See cases cited in the last section; also *New England Fire & Mar. Ins. Co. v. Robinson*, 25 Ind. 536, 537; *Whitaker v. Farmers' Union Ins. Co.*, 29 Barb. (N. Y.) 312; *Southern Life Ins. Co. v. Kempton*, 56 Ga. 339.

the broker;¹ or if the applicant agrees that the agent of the insurers shall be his agent for the "execution of the contract."² The delivery may be by any act³ intended to signify that the instrument shall have present vitality,⁴ as when it is held by the agent of the insurers at the request of the insured, subject to the order and control of a mortgagee whose interest is covered by it.⁵ A policy purporting to be "signed, sealed, and delivered," as required by the charter, is complete and binding as against the party executing it, though, in fact, it remain in his possession, unless some further particular act be required to be done by the other party to declare his adoption of it. No formal acceptance is necessary to complete the delivery. Whether there is a delivery or not is often a question of intention. There is a delivery if the intention of both parties is, that from and after a certain act the policy shall become operative.⁶ And the rule thus laid down has been applied in a case where application was made on the 27th of September, the first year's premium to be paid in advertising the insurers' agency. The application was approved, a policy duly executed, and, on the 2d of October, mailed to the agent of the insurer who had forwarded the application. On the 4th of October the insurer died. On the 5th of October the policy came to the hands of the agent, and he immediately returned it to the insurers. The agency was advertised as agreed. Upon these facts it was held that the contract was complete when the policy was mailed to the agent. If

¹ *McLachlin v. Ætna Ins. Co.*, 4 Allen (N. B.), 173.

² *Alabama Gold Life Ins. Co. v. Herron* (Miss.), 10 Ins. L. J. 68.

³ [Delivery may be made by mailing the policy. But where the minds of the parties never met, the company does not become bound by mailing a policy which the applicant is not bound to accept. *Hamblet v. City Ins. Co.*, 36 Fed. Rep. 118 (Pa.) 1888.]

⁴ *Hallock v. Com. Ins. Co.*, 2 Dutch. (N. J.) 268; s. c. 3 id. 645.

⁵ *Home Ins. Co. v. Curtis*, 32 Mich. 402.

⁶ *Xenos v. Wickham*, L. R. 2 H. of L. 296, reversing same case in the Exchequer Chamber. "Delivery is either actual, *i. e.* by doing something and saying nothing; or else verbal, *i. e.* by saying something and doing nothing; or it may be by both; and either of these may make a good delivery and a perfect deed." 1 Sheppard, Touchstone, 57. See also *Doe v. Knight*, 5 B. & C. 632.

the premium was not paid in full it was the fault of the company.¹

§ 61. **Obligations Reciprocal; The Company may demand the Premium if the Applicant can demand a Policy.** — The cases we have been considering have been cases where the insured was seeking to enforce his rights against the insurers. But the insurers may have occasion to enforce their rights against the insured; as was the case where a defendant made written application for insurance to a mutual insurance company. The rate of premium was agreed upon by the parties and the policy was made out, and the defendant requested to take it and sign the premium note and pay the premium. He, however, refused, and the policies were never delivered. In an action brought to recover the amount of the premium and certain assessments, the court held that the plaintiff must fail, for the very obvious reason that no contract was ever completed between the parties. The proceedings on the part of the defendant were merely the initiatory steps to a contract. The plaintiffs, pursuant to the defendant's request, had prepared a policy which would take effect as a contract on being delivered, and not before. By the plaintiffs' by-laws the policy was not to be delivered until the payment of the premium and the signature of the deposit note, neither of which had taken place. If a loss had occurred, under the circumstances the plaintiffs would not have been liable, because there was no delivery of the policy.² But if the case had taken the form of a bill in equity to enforce a performance of the contract, the payment of the premium and assessments, and the execution of the deposit note, upon the general doctrine, which is so familiar and so well established, that, when all the terms of the contract are agreed on, and nothing remains to be done by either party but to execute, the court will compel execution, it is yet to be decided that such a bill would not be sustained. The rights and obligations of the parties are recip-

¹ Kentucky Mut. Ins. Co. v. Jenks, 5 Ind. 96; *post*, § 135.

² Real Estate Mut. Fire Ins. Co. v. Roessle, 1 Gray (Mass.), 336.

rocal, and if, as we shall hereafter see,¹ the defendant, in this case, upon tender of performance on his part, could have compelled the execution and delivery of a policy, it would seem to follow that the plaintiffs, on tender of performance on their part, could equally compel payment of the premium, and the execution and delivery of the deposit note. If the insurers, after the completion of the contract, refuse to accept payment of a premium in the manner agreed upon, or to execute the contract by delivery of the policy, the insured, without the tender of intermediate premiums, may after loss sue and recover as if the policy had issued, less the premium.²

§ 62. **Effect of the Provisions of the Charter or Policy on Rights of Parties.** — The relation of the delivery of a policy by a mutual insurance company to the consummation of the contract was considered under the following interesting circumstances: The general and local agents of the defendants, together, called upon the plaintiff on the 7th of October, and after negotiations with him applications were prepared by the general agent, upon request to be insured from that time, and signed by the plaintiff in a manner satisfactory to the general agent, who said the policies would be made out without delay. The local agent at the same time told the plaintiff that it made no difference to him whether the plaintiff paid the cash premium at that time, or when he should take the policies; and he did not then pay it. The plaintiff then asked the agents for a copy of the by-laws of the company, and was told that they had none with them, but he would be furnished with a copy on the policies. No rules or regulations of the company were made known to the plaintiff. It was also understood between the agents and the plaintiff that the policies should be made out at once, and left with M. and F., M. being the local agent and F. his partner, no time being fixed when the plaintiff should call for them. The policies were accordingly executed and left with F. before the loss. F. was afterwards told by the president of

¹ See *post*, § 565 *et seq.*

² *Shaw v. Rep. Life Ins. Co.*, 69 N. Y. 286, 287.

the company to put them in the safe and take care of them, but was afterwards directed by the company not to deliver them, and they were subsequently taken back by the company. On the 10th October the plaintiff tendered the premium to F., while the policies were yet in his keeping, but after he had been instructed not to deliver them, who declined to receive it for the company, but consented to hold it as a deposit till suit was brought, when it was paid into court. F. at the same time declined to deliver the policies. The policies provided that each person should pay upon the execution of his policy, and before its delivery, the premium thereon; that no insurance should take effect until the cash premium was paid; and that no insurance agent, or broker, forwarding applications, was authorized to bind the company in any case whatever. And it was held that, upon these facts, a jury might find a waiver of the right to receive the cash premiums before the delivery of the policies, and if they should find such waiver, the policies were effectual from the time when they were left with F. for delivery.¹

§ 63. **Effect of Charter and By-Laws** (*continued*). — On the other hand, there are numerous and most respectable authorities, that insurance companies whose charters and by-laws define the mode in which they may contract, and the time and circumstances under which their contracts shall become binding upon them, cannot be held otherwise than in conformity with such provisions.²

¹ *Braddon v. Appleton Mut. Ins. Co.*, 42 Me. 259. Cutting, J., dissented, on the ground that mutual insurance companies cannot waive a compliance with the terms and conditions upon which they may by their charter contract, as to which it was the duty of the plaintiff to have informed himself, adopting the rule laid down in the cases cited in the following section. See also, to the same point with the case above cited from the Maine reports, *Pino v. Merchants' Mut. Ins. Co.*, 19 La. An. 214; *New England Fire & Mar. Ins. Co. v. Schettler*, 38 Ill. 166, 167. And see also *Kelly v. Com. Ins. Co.*, 10 Bosw. (N. Y. Superior Ct.) 82; *ante*, § 22; *post*, § 65.

² [All who take out policies are bound by the charter and the laws of the State under which the company is formed. Such laws are a part of the contract; for example, the provisions in regard to insolvency. If the proceedings provided for by the charter and laws of the home State are adequate, they must be followed. *Fry v. Charter Oak L. Ins. Co.*, 31 Fed. Rep. 197 (Mo.) 1887; *Parsons v. Same*, id. 305; *Weingartner v. Same*, 32 id. 314. Persons dealing with the officers of a corporation are charged with notice of the extent of their powers as laid down in

In the case of *Belleville Mutual Insurance Company v. Van Winkle*,¹ it appeared that all the terms of the contract had been agreed upon, and that a policy was to be issued dated as of the day of the agreement, it being distinctly stated by the secretary of the company that the applicant was thenceforth insured, and that the policy should be made out and sent right away. The policy was executed upon the eighteenth day of April. On the twentieth day the secretary wrote to the applicant, requesting him to sign the enclosed premium note and forward by return mail. On the twenty-second day, and before the note could be returned, a fire occurred. The applicant then tendered his note and demanded his policy, which the company refused, and placed their refusal on the ground that no deposit note had been received at the time of the loss; whereas, it was provided by the charter of the company that "every person who shall become a member by effecting insurance shall, before he receives the policy, deposit his promissory note for such a sum of money as shall be determined by the directors," thus making the deposit note a condition precedent to the membership. And the court, upon bill in equity for relief, sustained this view, reversing the decree of the court below. The applicant, said the court, was bound to know the terms of the charter and by-laws, and it was his duty to see that the premium note was duly made and deposited, and if he chose to wait till it could be sent to him by the secretary and returned, it was at his own peril. The by-laws expressly forbade any person becoming a member until the premium note was deposited. No officer had any right to dispense with this condition, and no one had any right to rely upon his assurances that it could be dispensed with, or

the charter and by-laws. *Adriance v. Roome*, 52 Barb. 399, 411. A stranger dealing with the company is presumed to have read the statutes under which it is incorporated, and the articles of association, but where he has no notice to the contrary, he has a right to assume that all matters of internal arrangement have been duly complied with. *Re County L. Ass. Co.*, L. R. 5 Ch. 288; 39 L. J. Ch. 471. Members of a mutual insurance company are bound by its by-laws, so far as they are consistent with the nature of the institution. *Mut. Ass. Soc. v. Korn*, 7 Cranch, 396, 399.]

¹ 1 Beas. (N. J.) 333.

that the insurance should take effect before the deposit of the note.¹

§ 64. **Effect of Charter and By-Laws** (*continued*); **Neglect of Officer.** — But though mutual insurance companies and others may be inhibited by the terms of their charter from issuing policies except upon certain conditions, it does not follow that they are inhibited from agreeing to issue a policy in conformity with those conditions.² This was what was done in the New Jersey case just cited. And although the secretary may have transcended his power when he undertook to say that the insurance should take effect from and after the time of the conference, it was not beyond his right to promise that the policy should be sent right away. Had this been done, the policy would have been delivered at the time of the loss as a valid and binding policy. It was because he did not forward the note to be signed "right away," as he had agreed to do, that the policy was not issued before the fire. The secretary had a right to make this promise on behalf of the company, and the applicant had a right to rely upon it, and, it seems, did rely upon it. He was lulled into security by it; and by the fault of the secretary, that is, the company, he was without his promised policy when the fire occurred. If the fire had not occurred, can it be doubted that on a tender of the deposit note in response to the secretary's note enclosing it for signature, and refusal of the company to issue the policy thereupon, a bill in equity to enforce the delivery of the policy would have been sustained? If so,

¹ *Barrett v. Union Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 175; *Real Estate Mut. Fire Ins. Co. v. Roessle*, 1 Gray (Mass.), 336; *Montreal Ins. Co. v. McGilivray*, 9 L. C. (Q. B.) 488; *Spitzer v. St. Mark's Ins. Co.*, 6 Duer (N. Y. Superior Ct.), 6; *Mound City Mut. Fire Ins. Co. v. Curran*, 42 Mo. 374. See also *Flint v. Ohio Ins. Co.*, 8 Ohio, 501. This ground of defence would doubtless have been sufficient had it been answered to an action at law on the policy. A promise by the treasurer to see that the premium is paid is not the equivalent nor a waiver of the payment. *Buffum v. Fayette Mut. Fire Ins. Co.*, 3 Allen (Mass.), 360. And see also *Mulrey v. Shawmut Mut. Fire Ins. Co.*, 4 Allen (Mass.), 116, which was a case where the policy had been delivered, but the premium had not been paid to the company, though it had been paid to the agent, with whom they settled monthly. The payment of the premium was a condition precedent to the validity of this policy.

² See cases cited *ante*, §§ 22, 23.

how can the intervention of the fire change the obligations of the parties already previously entered into? It would seem that the company ought to be liable in such case for all damages resulting from their agent's failure to forward.¹ The neglect in such case was the neglect of the company, and differs, therefore, from the neglect of the agent in *Hoyt v. Mutual Benefit Life Insurance Company*,² who, after tendering the policy, and requesting payment of the premium, promised to call on a third person, to whom the applicant had referred him for the premium, but did not. This was held to be a merely personal undertaking on the part of the agent, in no way binding upon the company, and the facts and circumstances were not the equivalent of the actual delivery of the policy and payment of the premium.

§ 64 A. A *subsequent* alteration of the charter or by-laws cannot in general affect the contract of the assured.³ But the future by-laws of a society may by agreement be made part of the policy issued by the society.⁴ If the policy is inconsistent with a by-law the latter is waived.⁵ A by-law excluded by the terms of the contract does not affect it.⁶

§ 65. **Countersigning by Agent.** — In general, when the policy provides that the counter-signature of an agent is requisite to the validity of the policy, this counter-signature must be had.⁷ But this stipulation in a policy may doubtless be waived.⁸ Countersigning by the agent is evidence

¹ *Walker v. Farmers' Ins. Co.*, 51 Iowa, 679; *Christie v. North British Ass. Co.*, 3 Ct. of Sess. Cas. (Scotch) 360; *Somerset Ins. Co. v. May* (Pa.), 2 W. N. C. 43; *Tome v. Parkersburg Br. R. R. Co.*, 39 Md. 36; *Williams v. Canada Farmers' Mut. Ins. Co.*, 27 U. C. (C. P.) 119; *post*, § 69; *Patterson v. Royal Ins. Co.*, 14 U. C. (Ch.) 169; *Fish v. Cottenet*, 5 Hand. (N. Y.) 138; *Franklin Fire Ins. Co. v. Taylor*, 52 Miss. 441; *Woody v. Old Dominion Ins. Co. (Va.)*, 9 Ins. L. J. 276; *post*, § 67.

² 98 Mass. 539; *ante*, § 55.

³ [*Morrison v. Wis. O. F. Mut. Life Ins. Co.*, 59 Wis. 162.]

⁴ [*Supreme Commandery, &c. v. Ainsworth*, 71 Ala. 436.]

⁵ [*Davidson v. Old People's Mut. Ben. Ass.*, 39 Minn. 303.]

⁶ [*Doane v. Millville Ins. Co.*, 45 N. J. Eq. 274.]

⁷ *Hardie v. St. Louis Mut. Life Ins. Co.*, 26 La. An. 242.

⁸ [*Countersigning may be waived by delivery, but proof of proper delivery is essential.* Although a policy declares that it shall not be valid until countersigned by R. this condition may be waived by R., by receiving the premium and delivering the policy without such signature. *Chapman v. Delaware M. Ins. Co.*, 23 N. B.

of the completion and delivery of the contract. Yet if this evidence be wanting, other evidence may be equivalent; as, for instance, a delivery by letter from the agent.¹ And the counter-signature, at all events, is only necessary when a policy is issued. Though the charter of the company, or general statute law, or instructions to the agent, require the counter-signature of agents to policies, companies may, by themselves or their agents, agree to issue policies, and be bound thereby.² The fact, however, that a policy is issued to its own agent upon his life does not dispense with his counter-signature in order to make the policy valid, if the policy itself provides that it shall have no force until countersigned by such agent. Though the agent receive the policy, and place it amongst his private papers, it is no valid contract till it is countersigned by him.³ Nor can an agent renew a policy on his own life by charging the premium in his account with the company, if by the terms of the policy the payment is not to be binding unless acknowledged by a receipt signed by the president or secretary.⁴ The delivery

R. 121. The blank for the counter-signature, "This policy is not valid unless countersigned by — agent at —. Countersigned this — day of — 187 — agent," is only a meaningless form, and a policy delivered without such signature is valid. *O'Donnell v. Confederation L. Ins. Co.*, 2 Russ. & Geld. (Nova Sco.) 231. In this case the policy was executed as fully as the charter required, the counter-signature being an addition to charter requisites. Where a policy which by its conditions is not valid till countersigned and delivered, is sent to the agent to be so signed and delivered when the premium was paid, and there is evidence that the premium was paid but the policy was never signed and delivered, it was held that the company was not liable; the policy was not completed. *Confederation L. Ass. v. O'Donnell*, 10 Can. S. C. R. 92; 13 Can. S. C. R. 218 (a great variety of opinion among the judges). Mere possession by the assignée of the assured of a policy stating on its face that it is not to take effect until signed by the agent, and which is not so countersigned, is no evidence that the policy was ever delivered to the insured. *Prall v. Mut. Protection L. Ass. Soc.*, 5 Daly (N. Y.), 298, 299.]

¹ *Myers v. Keystone Mut. Life Ins. Co.*, 27 Pa. St. 268; *United Life, Fire, & Mar. Ins. Co. v. Insurance Co. of N. A.*, 42 Ind. 588; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241.

² *Walker v. Met. Ins. Co.*, 56 Me. 371; *Kelly v. Com. Ins. Co.*, 10 Bosw. (N. Y. Superior Ct.) 82; *Ellis v. Albany City Fire Ins. Co.*, 4 Lans. (N. Y.) 433; s. c. 50 N. Y. 402.

³ *Badger v. The American Popular Life Ins. Co.*, 103 Mass. 244. But see *Norton v. Phoenix Mut. Life Ins. Co.*, 36 Conn. 503.

⁴ *Donald v. Life Ins. Co.*, 4 S. C. (Richardson) 321. See also *Neuendorff v. World Mut. Life Ins. Co.*, 69 N. Y. 389.

by an unauthorized person of a policy requiring the counter-signature of a particular local agent to make it valid, is of no effect if the counter-signature of the agent be wanting.¹

§ 66. **Place of Contract.** — It follows from the rule that the contract is completed when the proposals of the one party have been accepted by the other by some appropriate act signifying the acceptance, that the place of contract is the place of the acceptance. And if an agent, resident in one State, of an insurance company resident in another, forwards the requisite papers to the home office, and a policy is thereupon issued and mailed directly to the applicant, the contract is a contract made in the State where the home office is situated; and, since the acceptance is the test of completion, it would seem that a transmission of the policy by mail to the agent, to be delivered by him to the applicant, would have the like effect.²(a) And upon this ground

¹ *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400.

² [Policies signed and sealed in Ontario, and sent to an agent in New York who fills them up and issues them there, are Ontario contracts. *Clarke v. Union F. Ins. Co.*, 6 Ont. R. 223.]

(a) Where application is sent by an applicant or his agent from one State to an insurance company of another, and there accepted, and a policy of insurance is there issued, it is a contract of the State where issued, as the place of the acceptance of a proposal is in general the place of contract; but a policy of insurance providing that it shall not be valid until countersigned by its agent at a certain place, is a contract of the State where so countersigned. *Galloway v. Standard F. Ins. Co.*, 45 W. Va. 237. See *Equitable L. Ass. Society v. Trimble*, 83 Fed. Rep. 85; *State Mut. F. Ins. Ass'n v. Brinkley Stave Co.*, 61 Ark. 1; *Curnow v. Phoenix Ins. Co.*, 37 S. C. 406; *Voorheis v. People's Mut. Ben. Society*, 91 Mich. 469. A policy applied for in New York and delivered there, if the premiums are paid there, is a New York contract, notwithstanding it is issued and signed in another State by a company resident in

another State. *Hicks v. National L. Ins. Co.*, 60 Fed. Rep. 690. See *Breitung's Estate*, 78 Wis. 33; *Mutual L. Ins. Co. v. Dingley*, 100 Fed. Rep. 408; *Seiders v. Merchants' L. Ass'n (Texas)*, 54 S. W. 753. A policy written in Massachusetts by a company resident there, and sent to its agent in New Hampshire, becomes a New Hampshire contract upon delivery to the insured, and the rights of parties under it are to be determined by New Hampshire laws. *Perry v. Dwelling-House Ins. Co.*, 67 N. H. 291. If an application for life insurance is made, and the policy is delivered, and the premium is paid in Maryland, the courts of that State have jurisdiction, and the policy of a Pennsylvania company, although sued on in Maryland, is to be construed by Pennsylvania statutes, and conditions of the policy, which might otherwise be valid in Maryland, are invalid so far as they conflict with the statutes of the State

it was held that a New York company which had accepted proposals forwarded by its agent from Ohio did not come within the statute of Ohio which prohibits foreign insurance companies to insure in Ohio without license.¹ If, however, by the terms of the policy, it is not to be binding unless countersigned by an agent resident at a designated place, that place must be regarded as the place where the contract is made, and the laws and usages of that place must govern in the interpretation of the contract.² And if the policy be sent to the agent for delivery on receipt of the premium, the contract is completed at the agency.³

[§ 66 A. And the contract may be subject to the laws of the State of the assured, although the premium is made payable at the home office. Where an application was made in Missouri and sent to New York, and the policy was executed

¹ *Hyde v. Goodnow*, 3 Comst. (N. Y.) 266; *Huntley v. Merrill*, 32 Barb. (N. Y.) 626; *Western v. Genesee Mut. Ins. Co.*, 12 N. Y. 258; *Bowser v. Lamb*, C. Ct. (Ind.) 6 Ins. L. J. 375; *Whitcomb v. Phoenix Ins. Co.*, C. Ct. (Mass.) 8 id. 624; *post*, § 863; *Shattuck v. Mut. Life Ins. Co.*, C. Ct. (Mass.) 7 Ins. L. J. 937.

² *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416; *Moore v. Charter Oak Life Ins. Co.*, Sup. Ct. (Cincinnati) 8 Ins. L. J. 78; [*Heebner v. Eagle Ins. Co.*, 10 Gray, 131, 143. The law of the State in which the policy is countersigned determines its validity. *Northwestern Mut. L. Ins. Co. v. Elliott*, 5 Fed. Rep. 225; 11 Repr. 325; 6 Sawy. 17. *Contra*, *Whitcomb v. Phoenix Mut. Ins. Co.*, 8 Repr. 642 (Mass.), 1879; *Smith v. Mut. L. Ins. Co.*, 5 Fed. Rep. 582, 10 Ins. L. J. 180 (1881).]

³ *Thwing v. Great Western Ins. Co.*, 111 Mass. 93.

from which the company comes. *Fidelity Mut. L. Ass'n v. Ficklin*, 74 Md. 172.

Where the insured requested by letter a policy from an agent living in another county, by whom it was issued, the transaction was held to have taken place in the county of the agent, within the meaning of a statute requiring suit to be brought where the transaction took place. *Sun Mut. Ins. Co. v. Crist* (Ky.), 26 Ins. L. J. 695. The laws of the place of contract are, in the absence of evidence, presumed to be the same as those where action is brought. *Goodwin v. Provident Savings L. Ass'n*, 97 Iowa, 226.

The fact that a policy is governed by the laws of one State does not prevent

an assignment thereof being governed by the laws of another State. *Union Central L. Ins. Co. v. Woods*, 11 Ind. App. 335; *Miller v. Campbell*, 140 N. Y. 457.

If an application for insurance is mailed from one State to the home office of a company in another State, which is not authorized to do business in the former State, and there accepted, and the policy is sent by mail, the contract is one which the resident of the first State is entitled to make; and the insurer's adjuster has a constitutional right to come there, and to follow his business in any State where his employment calls him. *French v. People*, 6 Col. App. 311; see *Marden v. Hotel Owners' Ins. Co.*, 85 Iowa, 584.

in New York and sent by mail to Missouri, and the premiums made payable in New York, it was held that the policy was subject to the Missouri statute.¹ (a) Suit on a premium note given in P. state to the agent of a company chartered in B. state is subject to the laws of P. state.² A contract must be governed by the law of the country where it was made.³ Where a contract of insurance is finally executed and delivered is the *lex loci contractus*.⁴ The interpre-

¹ [Wall v. Equitable L. Ass. Co., 32 Fed. Rep. 273 (Mo.), 1887.]

² [Thornton v. Western Reserve Farmers' Ins. Co., 31 Pa. St. 529, 532.]

³ [Wall v. Roberts, 3 Esp. 163, 164.]

⁴ [Heebner v. Eagle Ins. Co., 10 Gray, 131, 143. As to enforcing and expounding the contract, see Cox v. United States, 6 Peters, 172, 203; Duncan v. United States, 7 Peters, 435, 449.]

(a) Where the insured in Missouri applied to a New York company for a twenty-payment distribution policy stipulated in the application, which was part of the policy to be governed by the New York statute, such policies being a class by themselves in which the profits are divided among the holders, in which the first two annual premiums are paid together in advance; and the agent by receipt acknowledged payment of a sum less than the regular amount as a payment for two years, provided that if the application was not accepted by the company the note was to be returned; and a policy was duly transmitted to the insured, through the local agent, to be delivered on payment of premium; and the third annual premium was not paid when due, and the insured died soon after; and under the statute of Missouri it continued in force, though under the statute of New York it was void, it was held to be a Missouri contract, and governed by the law of that State, notwithstanding the stipulation of the parties. *Horton v. New York L. Ins. Co.*, 151 Mo. 604. See *Gibson v. Conn. F. Ins. Co.*, 77 Fed. Rep. 561; *Equitable L. Ass. Society v. Winning*, 58 id. 541; *Mutual Benefit L. Ins. Co. v. Robison*, id. 723; *Equitable L. Ass. Society v. Clements*, 140 U. S. 226; *Wiestling v. Warthin*, 1 Ind. App. 217. In an ac-

tion in Missouri by the insurer against a railroad for causing a fire, where the former was not authorized to do business in the State, but the insurance was first effected in Illinois by the president of the lumber corporation, and the premiums, though paid by him, were ultimately paid by the corporation itself, it was held that Illinois was the place of contract, and that the laws of Missouri did not apply. *Lumbermen's Mut. Ins. Co. v. Kansas City, Ft. S. & M. R. Co.*, 149 Mo. 165. Where an industrial policy in a New York company, insuring the life of C., a resident of Rhode Island, payable to one of certain persons whose relationship was described, was taken out by an aunt (the plaintiff), living in Rhode Island, whose name did not appear in connection with the contract; and, the policy having lapsed, a revival application was sent from Massachusetts, where she had moved, by the aunt, and the policy was stamped, revived, and returned to Massachusetts; and the insured continued to reside in Rhode Island, it was held that both the original and revived policies were Rhode Island and not Massachusetts contracts, and that the place of performance was the place of contract, unless otherwise intended. *Bottomley v. Met'n L. Ins. Co.*, 170 Mass. 274.

tation of contracts, however, is not always governed by the same law that decides its validity. Usage and all other aids to the discovery of the real intent of the parties must be taken into account. The standard of seaworthiness is that supplied by the custom of the port and country to which the vessel belongs, not that of the place where the insurance is made.¹ The separation of a city from a State has no effect upon existing contracts of insurance, though subsequent ones might be thus prohibited,² as where a company could only insure houses in the state (Va.) from which the city went.]

¹ [The *Titania*, 19 Fed. Rep. 101 S. P. S. Dist. of N. Y. 1883.]

² [Korn v. Mut. Ass. Co. of Va., 6 Cr. 192, 199 (U. S.).]

CHAPTER V.

TERMINATION AND REVIVAL.

CANCELLATION. — SURRENDER. — RENEWAL. — REVIVER.

ANALYSIS.

A. *Cancellation:*

requires agreement, reserved right, or some fact on which equity can act, §§ 67, 67 A, 67 M.

abandonment by the assured not assented to, no effect, § 67.

1. By agreement distinct from the policy.

a compromise involving surrender and cancellation terminates the contract, § 67 A.

a receipt acknowledging, may be rebutted if without consideration, § 67 A.

member of a mutual company cannot escape assessments by cancellation after the company is insolvent, § 67 A.

may be effected by agent of assured, § 67 B.

partner's assent to, conclusive on firm, § 67 B.

agent cannot keep such policy alive for himself, § 67 B.

an agent to procure insurance does not necessarily have authority to consent to cancellation, § 67 B.

assent of beneficiary necessary, §§ 67, 67 C.

2. Under conditions named in the contract.

construction of these is strict, §§ 67, 69.

the right must be exercised before loss, § 67.

by bringing suit, § 67.

Notice :

must be reasonable, §§ 67 D, 67 L.

must be unconditional demand, not a mere expression of desire, § 67 D.

must be in present tense, §§ 67, 67 D.

length of time before cancellation, § 68.

to the company's agent to cancel is operative as soon as the assured knows of it, § 67 E.

and a subsequent agreement with the agent to continue the policy is void, § 67 E.

by mail, § 67.

by bringing suit, § 67.

mistake in, not fatal, § 68.

3. To whom notice must be given,

assured or his authorized agent, § 67 F.

finding notice among assured's papers after his death not sufficient, § 67 F.

notice to general agent of assured sufficient, § 67 F.

although same person was agent for company, § 67 F.

notice to special agent for *procuring* the insurance not good, § 67 G.

e. g. broker, §§ 67 H, 67 L.

unless custom makes broker agent to receive notice, §§ 67, 67 I; see § 67 L.

or the policy declares he shall be deemed the agent of assured (?) §§ 67 I, 67 H.

to one of two persons severally interested does not affect the other, § 67.

4. Return of the unearned premium is also usually a condition of cancellation, §§ 67, 67 J.

if a premium was paid to the company, actual tender of the return premium is necessary, § 67 J.

except where the cancellation is by agreement, § 67 K.

a credit unassented to is insufficient, § 67 J.

but if no premium was paid, as where credit was given, no return is necessary, § 67 K.

if only a note was given the return premium is a credit on it, § 67 K.

agent retaining premium after notice of disapproval, with assent of assured, will not save the insurance, § 69.

For non-payment of premium must be before tender of the premium; Canada statute, § 67.

For refusal to pay assessment, means legal assessment.

5. The company *versus* its agent, § 67.

where the time to be allowed the assured to get new insurance is left to the agent and he allows three days, there is no such abuse of discretion as will make him liable to the company, § 67 L.
but delay of five days in communicating with assured, agent responsible, § 67 L.

agent cannot delegate discretion of cancellation, § 67 L.

agent is responsible to company if he gives notice to broker, instead of assured, and so fails to cancel, § 67 L.

and evidence of a custom to do so, will not be received in his favor, § 67 L.

agent has commission only on premiums earned, § 67 L.

6. Of policy will be decreed in equity,

where the assured had no interest, § 67 M.

where the policy was obtained by fraud, § 67 M.

but not for intemperance, § 67 M, the assured may reform.

7. Mistake of agent in notice in designating date of cancellation not material, § 68.

neglect of agent not prejudice assured, § 67.

cancellation of interim receipt, or contract, subject to approval, § 69.

agreement with agent after notice of disapproval to the assured, will not save the contract, though the agent retains the premium, § 69.

an agreement without consideration, subsequent to delivery of a policy, will not turn it into a contract, taking effect only on approval, § 69.

B. *Surrender* :

meeting of minds, and delivery of policy, with intent to surrender it, terminates it, §§ 69, 69 B.
if in a mutual company the member is no longer liable for assessments, § 69 B.

unless the company was insolvent at time of surrender, § 67 A.
re-delivery by the agent after knowledge of a loss cannot revive the policy, § 69 B.
on condition, is incomplete until condition is fulfilled, § 69 B.
after forfeiture, assured can recover no premiums, § 69 B.

C. *Renewal* :

What constitutes.

Parol renewal good even though the original policy stipulates otherwise, § 70 B.

but a policy under seal cannot be continued in force by parol, § 70 B.

the suit would have to be on the parol contract, not on the policy of, § 70 B.

if a parol agreement to renew is indeterminate, or a mere agreement with the agent that when the time comes he will make a renewal, it is very well not to hold the company, § 70 B.

but a present parol contract of renewal or revival, or a contract to issue a policy in renewal at the proper time ought to be binding under similar circumstances and to the same extent, as a parol agreement with the same agent for an original policy, and the authorities countenance this view, § 70 B.

Care must be taken as to the form of the suit. If there is any doubt about the renewal, suit should not be on the old policy but on the parol agreement to renew. Attention to this point, and to the special facts of each case, brings the decisions all into harmony. (See Ch. ii. Anal. 1.)

Terms of :

same as original contract, if not modified by a new application, or by circumstances, § 70 a, and notes.

Period covered. Parol not admissible to show receipt absolute on face is conditional.

Renewal to one of two original parties in a gross sum destroys apportioned insurance of first policy.

removal of property with consent or knowledge of agent at time of renewal binds the company and modifies the contract, § 70 a, and notes.

D. *Revival* :

only by new contract or by estoppel, § 70 C; see § 69 B.

retaining overpayment applied by law to revive by estoppel, § 70 B.

representations in revival certificate part of contract, § 70 C.

re-delivery of surrendered policy after agent knows of loss cannot revive it, § 69 B.

§ 67. **Cancellation.** — It need hardly be said that when the contract has been once entered into and become binding upon the parties, it cannot be cancelled by either, unless the right be reserved; nor can either party withdraw himself from its obligations without the consent of the other. And when the life of one is insured for the benefit of another, the consent of the beneficiary must be obtained.¹ When negotiations are had between the parties with reference to the abrogation of the contract, the same rules apply as in the making the contract. An agreement to abrogate, cancel, or rescind can no more be made or executed without mutual consent at some moment of time, and compliance with all the conditions, than could the original agreement have been made without that consent.²(a) The right of cancellation on notice, reserved by the terms of the policy to either party, should be exercised with care that the notice be explicit, and the conditions strictly complied with. A mere notice of a desire or intention to cancel is not such an exercise of the right of cancellation as will relieve a company from the obligations of the policy.³ In *Atlantic Insurance*

¹ *Forsyth v. National Life Ins. Co.*, Superior Ct. Cook Co. Ill., 1873; *Trager v. Louisiana Eq. Life Ins. Co.*, 9 Ins. L. J. 817; *Marrin v. Stadacona Ins. Co.*, 4 U. C. (App. R.) 330; *Chase v. Ins. Co.*, 67 Me. 85. See § 67 C.

² *Alliance Mut. Ins. Co. v. Swift*, 10 Cush. (Mass.) 433; *Head v. Providence Ins. Co.*, 2 Cranch (U. S.), 127; *Sands v. Hill*, 42 Barb. (N. Y.) 651; *Fabyan v. Union Mut. Fire Ins. Co.*, 33 N. H. 203; *Bennett v. City Ins. Co.*, 115 Mass. 241; *Howland v. Continental Ins. Co.*, 121 Mass. 499; *Massasoit Mills v. Western Ass. Co.*, 125 Mass. 110; *Poor v. Hudson Ins. Co.*, C. Ct. (N. H.) 9 Ins. L. J. 428; *Wilkins v. Tobacco Ins. Co. (Ohio)*, 30 Ohio St. 317.

³ *Goit v. National Protection Ins. Co.*, 25 Barb. (N. Y.) 189; *Grace v. Am.*

(a) See *Burns v. Va. L. Ins. Co.*, 82; *Von Wien v. Scottish Union & Nat'l Ins. Co.*, 118 N. Y. 94. The insurer may be estopped to claim a forfeiture if it allows the policy to remain uncanceled after notice of an increase of risk. See *Schmurr v. State Ins. Co.*, 30 Oregon, 29; *West End Hotel & Land Co. v. American F. Ins. Co.*, 74 Fed. Rep. 114; *Latimore v. Dwelling-House Ins. Co.*, 153 Penn. St. 324. The insurer has the burden of proof to show compliance with conditions requisite to cancellation. *American F. Ins. Co. v. Brooks*, 83 Md. 22.

Company v. Goodall, it was held that the cancellation took effect in that particular case before it had been assented to by the other party interested. But this was because it was agreed between the parties litigant that, as between them, only one of whom was interested in, or a party to, the cancelled contract, the cancellation should be deemed to take effect before that time. The insurers under a new policy agreed that a surrender of the old policy should protect the newly assured from any danger by reason of a stipulation in the new policy that other insurance not indorsed upon the new policy should render the new policy void.¹ If the policy be terminable on notice merely, for forfeiture for non-payment of premium or otherwise, the notice may be peremptory or conditional,² and even after a loss.³ [By the law of Canada, where power is given to cancel a policy for non-payment of premium, the power must be exercised before tender of the amount due.⁴] Where the policy had once taken effect, although the insured declared that he would have nothing further to do with the insurers, and that he abandoned the whole thing, but still retained the policy, while the insurers retained the note, and nothing appeared to show that they assented to the abandonment, the plaintiff was afterwards allowed to recover.⁵ And the exercise of the right will also be confined strictly within the terms under which it is allowable by the provisions of the contract. If the contract be made terminable on a refusal to pay an

Central Ins. Co., C. Ct. (Mo.) 8 Ins. L. J. 95; *Cain v. Lancashire Ins. Co.*, 27 U. C. (Q. B.) 217, 453; *Lyman v. State Mut. Ins. Co.*, 14 Allen (Mass.), 329; *Peoria Fire & Mar. Ins. Co. v. Botto*, 47 Ill. 516; *Ætna Ins. Co. v. McGuire*, 51 Ill. 342; *Hathorn v. Germania Ins. Co.*, 55 Barb. (N. Y.) 28; *Trager v. Louisiana Eq. Life Ins. Co. (La.)*, 9 Ins. L. J. 817; *American Ins. Co. v. Woodruff*, 34 Mich. 6; *Grant v. Reliance Mut. Ins. Co.*, 44 U. C. (Q. B.) 229; *Joliffe v. Madison Mut. Ins. Co.*, 39 Wis. 111. An equivocal notice, if accepted and acted upon by the other party, will be good against the party giving it. *Columbia Ins. Co. v. Masonheimer*, 76 Pa. St. 138.

¹ 35 N. H. 328.

² *Bergson v. Builders' Ins. Co.*, 38 Cal. 541; *Southside Fire Ins. Co. v. Mueller* (Pa.), 8 Ins. L. J. 260.

³ *Bruce v. Gore Dist. Mut. Ins. Co.*, 20 U. C. (C. P.) 207.

⁴ [*Vennor v. L. Ass. of Scot.*, 30 L. C. Jur. 303.]

⁵ *McAllister, Adm'x, v. New England Mut. Life Ins. Co.*, 101 Mass. 558.

assessment on demand, an illegal assessment, or one not laid according to the rules by which the insurers are governed, is in point of law no assessment, and the refusal, on demand, of payment of such an assessment gives no right to terminate the contract.¹ If the insurance be terminable "on giving notice to that effect, and refunding a ratable proportion of the premium," it is not cancelled by a notice that the insurers will cancel the policy and return the *pro rata* premium, but will give the insured till a certain day to effect insurance elsewhere. The notice should be that the policy is then and there cancelled, and the *pro rata* premium, sufficient in amount, should be at the same time paid or tendered to the insured. The acceptance of the return premium by the insured, after such insufficient notice, might, indeed, cancel the policy; but the cancellation must be taken to be as of the date of the payment and acceptance of the return premium. Hence, if a fire intervene between the date of the notice and the acceptance of the return premium, unknown to the insured, he will not lose his right to recover for the loss.² (a) Surrender of the policy before, and payment of return premium after the loss, neither party at

¹ Matter of People's Mut. Equitable Fire Ins. Co., 9 Allen (Mass.), 319. See also *post*, § 574.

² Van Valkenburgh v. Lenox Ins. Co., 51 N. Y. 465; Lyman v. State Mut. Fire Ins. Co., 14 Allen (Mass.), 329; Little v. Eureka Ins. Co., Superior Ct. (Cincinnati) 5 Ins. L. J. 154; Peoria Fire & Mar. Ins. Co. v. Botta, 47 Ill. 516; Planters' Ins. Co. v. Walker Lodge (Texas), 11 Repr. 142.

(a) As to return of unearned premiums, see *Manlove v. Com'l Mut. F. Ins. Co.*, 47 Kansas, 309; *Phoenix Ass. Co. v. Munger Improved Cotton M. M. Co.*, 92 Texas, 297; *Davison v. London & L. F. Ins. Co.*, 189 Penn. St. 132; *Tisdell v. New Hampshire F. Ins. Co.*, 155 N. Y. 163; *Norris v. Hartford F. Ins. Co.*, 55 S. C. 450; *Colby v. Cedar Rapids Ins. Co.*, 66 Iowa, 577; *East Texas F. Ins. Co. v. Flippin*, 4 Tex. Civ. App. 576; *Hartford Steam Boiler Insp. & Ins. Co. v. Cartier*, 89 Mich. 41; *Smith v. National Credit Ins. Co.*, 65 Minn. 283. A wrongful cancellation of

a life policy containing no stipulations as to return of premiums does not entitle the insured to recover back the premiums paid, his remedy being to compel reinstatement, or by an action for damages, of which the measure would be the cash surrender value of the policy; but if the risk had not attached, such recovery can be had. In order to sustain an action for such return of premiums, the complaint must show the terms of the contract, performance of its conditions, and a refusal of the other party to perform. *Met'n L. Ins. Co. v. McCormick*, 19 Ind. App. 49.

the time knowing of the loss, does not cancel.¹ And where the right is to cancel a contract within thirty days, by causing a notice to that effect to be mailed to the insured, a notice mailed within thirty days, but not reaching the insured by due course of mail till after the fire, will not cancel the contract.² (a) When an insurance company has the right to continue or cancel the policy upon certain contingencies, they must exercise that right within reasonable time and before a loss, or they will be held bound by the policy.³ And the neglect of an agent of the insurers charged with the negotiations will be imputable to his principal, and will not prejudice the rights of the insured under his contract.⁴ (b) And where two parties are severally interested, notice to one does not affect the other.⁵ It is competent for the parties to agree that a particular act, such, for instance, as the bringing a suit on an overdue note, shall cancel the policy.⁶ When, after specifying certain cases in which the insurers shall have the right to terminate the risk, the policy adds, "Or if for any other cause the company shall so elect, it shall be optional with the company to terminate the insurance," the right is absolute in the insurers on performing the conditions, and is not restricted to causes like those previously enumerated.⁷

¹ Hollingsworth v. Germania Ins. Co., 45 Ga. 294.

² Tough v. Provincial Ins. Co., 20 L. C. Jour. (Q. B.) 168; Goodwin v. Lancashire Fire & Life Ins. Co., 18 id. 1.

³ Le Soliel v. Delord, Dalloz, Jur. Gén., Ct. of Cass. 1868, 1, 335.

⁴ Franklin Fire Ins. Co. v. Massey, 33 Pa. St. 221; Patterson v. Royal Ins. Co., 14 U. C. (Ch.) 169. See also *ante*, §§ 57, 64.

⁵ Guggisberg v. Waterloo Mut. Ins. Co., 24 U. C. (Ch.) 350.

⁶ Shakey v. Hawkeye Ins. Co., 44 Iowa, 540.

⁷ International Ins. Co. v. Franklin Ins. Co., 66 N. Y. 119.

(a) Notice of cancellation by mail is not effectual unless received. *American F. Ins. Co. v. Brooks*, 83 Md. 22; *Farnum v. Phenix Ins. Co.*, 83 Cal. 246.

(b) See *British Ins. Co. v. Lambert*, 26 Oregon, 109; *Royal Ins. Co. v. Clark*, 61 Minn. 476. When the policy provides for its termination at any time upon the insured's request, delivery for cancellation to an agent terminates it immediately; and such right to terminate is not affected by the appointment

of a receiver. *Ins. Com'r v. People's F. Ins. Co.*, 68 N. H. 51; see *Scottish Union & Nat'l Ins. Co. v. Dangaix*, 103 Ala. 388.

An agent, who receives orders to cancel a policy, and delays their execution until the property insured is destroyed by fire, is liable to the company for loss that may occur in consequence of such violation of orders. *Sun Fire Office v. Ermentrout* (Penn., Berks. Co.), 21 Ins. L. J. 1055. See *Halsey v. Adams* (N. J. L.), 43 Atl. 708.

[§ 67 A. **Cancellation by Agreement.** — If a compromise is made which involves the surrender and cancellation of the policy as one of its terms, the risk is ended by the compromise agreement, and the company is not liable for an after occurring loss.¹ (a) The agent notified the insured that the company had determined to cancel, and the insured brought the policy to their own place of business to surrender it, but the agent failed to call, so that it was not surrendered. The insured, however, regarding it as cancelled, began negotiations for other insurance. It was held that the evidence was sufficient to justify the finding of a cancellation.² An agreement to receive a certain sum as return premium to cancel the policy, and the payment of the said sum before loss is a good cancellation, although the sum agreed on is not exactly the ratable part of the premium referred to in the policy.³ A receipt signed by an insured person, acknowledging the cancellation of the policy (signed under the misapprehension that a policy in another company had been prepared by the agent, who brought the receipt for signature, which was a false statement, though made *bona fide* by the agent), does not estop him from suing on the policy when no consideration for the receipt appears.⁴ After a mutual company has become, *in fact*, insolvent, though perhaps not yet declared so, it is impossible for a member by agreement with the company to have his policy cancelled, and so escape future liability.⁵ A member of a mutual company stands in the position of a stockholder.]

[§ 67 B. **Cancellation by Agent of Assured; Agent to procure Insurance not necessarily Agent to cancel.** — Where W. insured for M. several times, taking out a new policy as the old one was cancelled, but finally, after receiving notice to

¹ [King v. *Ætna Ins. Co.*, 36 Mo. App. 128; King v. *Ins. Co.*, id. 142.]

² [Hopkins v. *Phoenix Ins. Co.*, 19 Ins. L. J. 90 (Iowa), Oct. 1889.]

³ [*Ætna Ins. Co. v. Weissinger*, 91 Ind. 297.]

⁴ [Holden v. *Putnam F. Ins. Co.*, 46 N. Y. 1.]

⁵ [Doane v. *Millville Mut. Ins. Co.*, 43 N. J. Eq. 522.]

(a) See *Mutual L. Ins. Co. of New York v. Phinney*, 20 Sup. Ct. Rep. 906; *Same v. Sears*, id. 912.

cancel a policy, and doing so, by returning it to the home office and receiving the unearned premium for M., failed to obtain any further insurance, the facts tended to show that W. was M.'s agent for cancellation, and should go to the jury.¹ A partner's assent to the cancellation of a firm policy is conclusive on the firm.² An agent employed by a policy-holder to cancel a policy cannot keep it in force for his own benefit,³ and any advantage (as funds paid on the policy) he may gain by deviating from the instructions of his principal, can be claimed by the latter. When a policy was issued at the instance of the assured's agent, who, when called upon to pay the premium, referred the company to the assured, who in turn declined to pay, on the ground that the agent must have paid it; and when the agent then advised the company to cancel the policy, which they did, it was held that the company was still liable, the agent having no authority to order a cancellation, and that the inference was that the assured had been given credit for the payment of the premium, and that it was not at the company's option to cancel the policy or dissolve the contract without putting the plaintiff *in mora*.⁴ An agency to procure insurance ends when it is procured, and the agent cannot afterwards consent to a cancellation.^{5]}

[§ 67 C. **Beneficiary's Assent necessary.** — Where the life of a husband is insured for the sole use of the wife, payable to her, if living, in thirty days after proof of his death, a cancellation of the policy in consequence of the fraudulent representation of the husband that his wife was dead, can have no effect upon her rights.⁶ A policy "payable to F. L. and A. L., mortgagees," though it may be defeated by breach of conditions by the insured, cannot be cancelled by him without the consent of these payees.^{7]}

¹ [McCartney v. State Ins. Co., 33 Mo. App. 652.]

² [Hillock v. Traders' Ins. Co., 54 Mich. 532.]

³ [Dutton v. Willner, 52 N. Y. 312.]

⁴ [Latoix v. Germania Ins. Co., 27 La. An. 113.]

⁵ [Insurance Cos. v. Raden, 87 Ala. 311. See § 67 G.]

⁶ [Knapp v. Homeopathic Mut. L. Ins. Co., 117 U. S. 411, 413.]

⁷ [Lattan v. Royal Ins. Co., 45 N. J. 453.]

[§ 67 D. **Notice, Character of it.** — Reasonable notice of cancellation must be given by the company, and what is reasonable is a question for the jury. Only where there is fraud, actual or constructive, will cancellation without notice be lawful.¹ To effect a cancellation the notice must reach the assured in the shape of an unconditional demand for cancellation, not a mere expression of desire.² The right in the company to cancel is strictly construed. The notice must be that the policy *is* cancelled, not *will be*, and the unearned premium must be tendered.³ (a)]

[§ 67 E. **Notice to Company's Agent operative when assured knows of it.** — When the company has a right to terminate the policy by notice, a notice sent to the agent is effectual from the time the insured knows that the agent has received it, and a subsequent agreement with the agent to continue the policy cannot bind the company.⁴]

[§ 67 F. **To Whom notice is to be Given.** — The notice must be given to assured or his authorized agent.⁵ Finding the notice of cancellation among the papers of the insured after death, the fire having occurred in his life, is not sufficient proof of service for cancellation before loss.⁶ Notice of cancellation given to the general agent of the insured is sufficient.⁷ When one person is at the same time an agent for the assured and for the insurer, notice of cancellation of the policy to him will be notice to the policy-holder.⁸]

[§ 67 G. **Notice to Procuring Agent not sufficient.** — A policy cannot be terminated by notice to a special agent who

¹ [Chadbourne v. Germ. Amer. Ins. Co., 31 Fed. Rep. 533, 24 Blatch. 492 (N. Y.) 1887.]

² [Petersburg Savgs. & Ins. Co. v. Manhattan F. Ins. Co., 66 Ga. 446.]

³ [Planters' Ins. Co. v. Walker Lodge No. 19, 1 Tex. Civ. Cas. § 758.]

⁴ [Springfield F. & M. Ins. Co. v. McKinnon & Call, 59 Tex. 507.]

⁵ [Von Wein v. Scottish, &c. Ins. Co., 52 N. Y. Super. 490; 54 N. Y. Super. 276; Lancashire Ins. Co. v. Nill, 114 Pa. St. 248.]

⁶ [Lattan v. Royal Ins. Co., 45 N. J. 453.]

⁷ [Stone v. Franklin F. Ins. Co., 105 N. Y. 543.]

⁸ [Hartford Ins. Co. v. Reynolds, 36 Mich. 502, 507; Newark Ins. Co. v. Sammons, 11 Ill. Ap. 230, 237.]

(a) A notice to the insured, directing attention to the effect of failure to pay the premium, and to the cancellation clause in the policy, is not a notice of cancellation within the policy. *Savage v. Phoenix Ins. Co.*, 12 Mont. 458.

was entrusted only with authority to *procure* insurance for the plaintiff.¹ (a) Where a policy provides for its own termination by notice and refunding a ratable part of the premium, and declares that the person procuring the insurance shall be deemed the agent of the assured, and not of the insurers, "under any circumstances whatever, or in any transactions relating to this insurance," yet notice of termination to the person procuring the insurance is not notice to the insured. And parol evidence of a custom of insurance men to give such notice to such person cannot be received to vary the terms of the contract.² One who was agent to procure insurance is not necessarily authorized to receive notice of cancellation.³ Even though the policy provides that notice of cancellation may be given to the person who procured the insurance, the provision will not apply where the same person acted for both parties in procuring and issuing the policy.⁴

[§ 67 H. A broker employed to procure insurance has no authority to give or receive notice of cancellation. When he procures the insurance his agency ends.⁵ The employment of a broker to effect insurance does not

¹ [Hermann v. Niagara F. Ins. Co., 100 N. Y. 411.]

² [Grace v. Amer. Cent. Ins. Co., 109 U. S. 278, 283.]

³ [Body v. Hartford F. Ins. Co., 63 Wis. 157; Broadwater v. Lion F. Ins. Co., 34 Minn. 466.]

⁴ [Insurance Cos. v. Raden, 87 Ala. 311.]

⁵ [Von Wein v. Scottish, &c. Ins. Co., 52 N. Y. Super. 490.]

(a) See Karelson v. Sun Fire Office, 122 N. Y. 545; Quong Tue Sing v. Anglo-Nevada Ass. Corp., 86 Cal. 566; Sun Fire Office v. Ermentrout (Penn.), 21 Ins. L. J. 1055; British-America Ass. Co. v. Cooper, 6 Col. App. 25; White v. Ins. Co. of New York, 93 Fed. Rep. 161; Arnfeld v. Guardian Ass. Co., 172 Penn. St. 605; Buick v. Mechanics' Ins. Co., 103 Mich. 75; Scott v. Sun Fire Office, 133 Penn. St. 322; East Texas F. Ins. Co. v. Blum, 76 Texas, 653. A surrender of the policy to the agent to replace in case of cancellation does not make him the agent

of the insured to receive notice of cancellation. A tender of premium to the agent, and his advice to let the matter rest until the company decides about cancelling, amount to an indefinite extension of time, and a waiver of non-payment. Mallory v. Ohio Farmers' Ins. Co., 90 Mich. 112. Where the policy provided that it might be terminated by notice to the insured or his representatives, notice of cancellation served on the brokers who procured the insurance, where the residence of the principal was unknown, was held sufficient, in Royal Ins. Co. v. Wight, 55 Fed. Rep. 455.

make him the agent of the assured to receive notice of cancellation.^{1(a)}

[§ 67 I. Evidence of a general custom of the fire insurance business, making notice of cancellation to the broker employed by the insured to procure the policy a sufficient notice to the insured, is inadmissible.² In Illinois it is held that where the policy provides that a broker effecting insurance shall be deemed the agent of the insured, notice to the broker to cancel the policy is notice to the assured.³

[§ 67 J. **Return of Premium.** — If a policy provides for its termination by giving notice and refunding a ratable proportion of the premium, a notice of the company's wish to cancel and a request to return the policy upon which the premium would be remitted is not sufficient. Nothing short of notice and actual tender of the premium will do.⁴ It has been held that the exclusion of evidence with reference to what was done about cancelling a policy where the premium was not returned until the loss actually occurred, was proper.⁵ Repayment, or tender of the ratable proportion of the premium, or waiver of it, is necessary to cancel the policy, as well as notice, and a credit given the assured on a debt due from him, that credit not being assented to by him, is insufficient.⁶]

[§ 67 K. *When no Return of Premium is necessary.* — But where no premium has actually been paid, a charge on account being all that has transpired in that matter, notice alone without tender of premium is sufficient to cancel the

¹ [Adams v. Manufacturers', &c. F. Ins. Co., 17 Fed. Rep. 630, R. I. 1883. Kehler v. New Or Ins. Co., 23 Fed. Rep. 709 Mo. 1885; Ind. Ins. Co. v. Hartwell, 100 Ind. 566. This case follows 109 U. S. 278, in ruling that a broker "employed to procure insurance" is not the agent of the assured after the procurement is complete, for receiving notice of cancellation, or anything else, even though the policy declares that the broker shall be deemed the agent of the assured for matters connected with the insurance.]

² [Grace v. American Central Ins. Co., 109 U. S. 278.]

³ [Newark F. Ins. Co. v. Sammons, 11 Brad. 230; *contra*, 100 Ind. 566, and 109 U. S. 278 *supra*.]

⁴ [Griffey v. N. Y. Central Ins. Co., 100 N. Y. 417.]

⁵ [McGraw v. Germania F. Ins. Co., 54 Mich. 146.]

⁶ [Lattan v. Royal Ins. Co., 45 N. J. 453.]

(a) Such authority may be inferred White v. Ins. Co. of New York, 93 Fed. Rep. 161. from their previous course of dealing.

policy.¹ If a note has been given for the premium, the *pro rata* amount to be returned in case of cancellation need not be tendered; the note is subject to that credit.² When credit in any shape has been given for the premium the company does not have to return anything upon cancellation.³ And tender of the unearned premium is unnecessary to complete a cancellation if the minds of the parties have met on a rescission.⁴

[§ 67 L. **The Company versus its Agent.** — When a company intrusts to its agent the duty of cancellation of a specific policy, without definite instructions as to time to be allowed, nothing short of abuse of discretion or fraud on the part of the agent relieves the principal from liability before actual cancellation. The insured is entitled to reasonable notice of intent to cancel, and if the company does not prescribe the time within which the cancellation shall be completed, nothing but an absolute abuse of the discretion so left to the agent, or fraud on his part, will relieve the principal.⁵ (a) In this case the agent receiving the policy from the office with instructions to cancel gave the applicant three days to get other insurance, and a fire occurring within the three days the company was held. But unreasonable delay in communicating with the assured will make the agent responsible, as where an agent could have notified the insured that his policy was cancelled within half an hour after receiving word to that effect from the company, but delayed till the property was burned five days afterward, the finding of negligence on the part of the agent in a suit against him by the company was held proper.⁶ Agents of an insurance company cannot delegate the discretion of can-

¹ [Stone v. Franklin F. Ins. Co., 105 N. Y. 543.]

² [Little v. Insurance Co., 38 Ohio St. 110.]

Von Wein v. Scottish, &c. Ins. Co., 52 N. Y. Super. 490.]

Hillock v. Traders' Ins. Co., 54 Mich. 531.]

⁵ [McLean v. Republic Ins. Co., 3 Lansing, 421.]

⁶ [Phoenix Ins. Co. v. Frissell, 142 Mass. 513.]

(a) Instructions to the agent to cancel. Watertown Fire Ins. Co. v. Rust, 141 Ill. 85.
cel, in the absence of knowledge by the insured, does not affect the latter.

selling a policy, but it is not necessary that they should personally give notice or tender the return premium.¹ If a company orders its agent to cancel a policy and by his neglect or disobedience it suffers loss, he is liable,² and cannot shield himself by showing that he had directed the broker who placed the insurance with him to cancel the policy. Evidence of a custom to procure cancellation in this way is inadmissible in the agent's defence.³ (a) It seems that on the cancellation of a policy the agent is only entitled to commissions on the premiums earned before cancellation.⁴ (b)]

[§ 67 M. **Cancellation of Void Policy in Equity.** — When the policy is void for lack of interest in the assured,⁵ or for fraud in effecting it,⁶ (c) equity will order a cancellation of it. The fact that the insured has become intemperate will not induce equity to cancel the policy, for he may reform.⁷]

§ 68. **Cancellation; Notice.** — If the policy provide the length of the notice to be given, it does not seem to be material that the notice itself makes a mistake in the desig-

¹ [Runkle v. Citizens' Ins. Co., 6 Fed. Rep. 143 (Ohio), 1881.]

² [Washington F. & M. Ins. Co. v. Chesebro, 35 Fed. Rep. 477 (Conn.), 1887.]

³ [Franklin Ins. Co. v. Sears, 21 Fed. Rep. 290 (Ohio), 1884.]

⁴ [Deveraux v. Insurance Co., 98 N. C. 6.]

⁵ [Goddart v. Garrett, 2 Vern. 269.]

⁶ [Fenn v. Craig, 3 H. C. 216, 222.]

⁷ [Connecticut Mut. L. Ins. Co. v. Bear, 26 Fed. Rep. 582 (N. C.), 1886.]

(a) A local custom that insurance agents, after the termination of their agency, may cancel any of the policies issued through them, is unreasonable, contrary to the rules of law applicable to principal and agent, and is void. Merchants' Ins. Co. v. Prince, 50 Minn. 50. 568.

(b) The compensation of agents is determined by their contracts, express or implied; the general course of business is evidence, and the fact that full premiums, less commissions, have been allowed on cancelled policies in some circumstances, as a matter of expediency, does not establish such allowance as a matter of law. Ins. Com'r v. People's Fire Ins. Co., 68 N. H. 51. See also on this section, Northern Ass. Co. v. Hamilton, 50 Neb. 248; Kooistra v. Rockford Ins. Co. (Mich.), 81 N. W. 568. (c) See Swain v. Security Live-Stock Ins. Co., 165 Mass. 321. The cancellation of a policy may also be set aside when made under a mistake of fact. Duncan v. New York Mut. Ins. Co., 138 N. Y. 88. Where prior insurance on the property had been cancelled because the insurer was retiring from business, and the application denied prior refusal or cancellation of a policy, this was held not to be a material misrepresentation, as the cancellation was not for a cause affecting the risk. Hawley v. Liverpool, &c. Ins. Co., 102 Cal. 651.

nation of the date when the policy will become cancelled, provided the required time shall have elapsed between the time when the notice is given and loss shall have happened. Thus, where it was provided that after seven days' notice of intention to cancel, the insurance should terminate, a notice dated the 13th of February, and deposited on that day in the post-office, but not till after the office was closed for the day, which notice was received by the insured on the next day in due course of mail, and informed him that his insurance would terminate on the 20th, the loss not having occurred till the 22d, it was held that the notice was sufficient both within the letter and the spirit of the contract.¹ But this case is a departure from the usual strictness.

§ 69. **Cancellation; Intermediary Receipt.** — So, too, a contract of insurance made by what is sometimes called an intermediary receipt given by an agent, that is, a receipt for the premium, containing a statement that the receipt is subject to the approval of the insurers, to be notified to the insured, and certifying that meanwhile the applicant is insured for a specified time, may be cancelled within the time specified, and at any period prior to that time, if notice of disapproval be given. In other words, the certificate of insurance for a specified time pending the negotiation for a policy does not constitute an absolute contract for that time, but only a conditional contract that the insurance shall extend for the specified time, unless the insurers, having the option to decline the risk, shall sooner signify their determination to decline.² Here, however, as in other cases, the right to cancel will be strictly construed,³ and notice and an offer to refund must be previously given, if required.⁴ [Although by payment of the premium, &c., a provisional contract may be created, yet the company may reject the application and annul the contract, and it will not be held, because the

¹ *Emmott v. Slater Mut. Fire Ins. Co.*, 7 R. I. 562.

² *Goodfellow v. Times & Beacon Ass. Co.*, 17 U. C. (Q. B.) 411.

³ [When the policy prescribes the conditions on which cancellation by the company can be made, they must be strictly complied with or the company will be liable. *Landis v. Home Mut. F. & M. Ins. Co.*, 56 Mo. 591, 598.]

⁴ *Grant v. Reliance Mut. Fire Ins. Co.*, 44 U. C. (Q. B.) 229.

agent, by arrangement with the assured, retained the premium while attempting to get the company to reconsider its rejection.¹ Where a policy, duly signed, was given A. by the company's duly authorized agent, the company was liable, although immediately after the delivery of the policy the agent got A. to sign a formal application containing a memorandum stating that the policy was not to go into effect until approved by the general agent, who subsequently gave the local agent notice to cancel the policy, which, however, was not done before loss. The effect of the memorandum could be no more than to reserve a right of cancellation, and until the policy was actually cancelled the company would be held.^{2]}

§ 69 a. **Surrender; Paid-up Policy.** — Not so much strictness seems to be required on the surrender of one policy in order to obtain another. Here a desire expressed within the term, to which no dissent is expressed, and a completion of the requisite acts, delivery of the old policy, &c., after the expiration of the term, were held sufficient in equity.³ (a)

[§ 69 B. An agreement in good faith between the parties

¹ [Otterbein v. Iowa Ins. Co., 57 Iowa, 274.]

² Insurance Co. v. Webster, 6 Wall. 129.]

³ Morrison v. American Popular Life Ins. Co., C. Ct. (N. H.) 5 Ins. L. J. 752. See also Farmers' Mut. Ins. Co. v. Wenger (Pa.), 8 Ins. L. J. 712; Train v. Holland, &c. Ins. Co., 68 N. Y. 208. As to policies for a term of years, void or voidable for non-payment of annual premium, see *post*, § 342.

(a) As to surrender to obtain a new policy, usually to obtain a paid-up policy, see *Heinlein v. Imperial L. Ins. Co.*, 101 Mich. 250; *Terry v. Mutual L. Ins. Co.*, 116 Ala. 242; *McLaughlin v. Equitable L. Ass. Society*, 38 Neb. 725; *Manton v. Robinson*, 19 R. I. 405; *Riegel v. American L. Ins. Co.*, 153 Penn. St. 134; *Crown Point Iron Co. v. Aetna Ins. Co.*, 127 N. Y. 608; *North-Western Mut. L. Ins. Co. v. Barbour* (Ky.), 15 L. R. Ann. 449, and note. If a policy stipulates for a paid-up policy after certain payments have been made, provided the policy be surrendered within a stated time, and such payments have been fully made in cash, time is not of the essence, and by a failure to apply and surrender the policy within the period stipulated, the assured does not lose his right to a paid-up policy; nor need a policy which has lapsed be surrendered in order to a right of action. *Mutual Life Ins. Co. v. Jarboe* (Ky.), 42 S. W. 1097. As to surrender under the *lex loci*, see *Equitable L. Ass. Society v. Clements*, 140 U. S. 226.

Surrender value in a mutual company, when allowed by a policy, is determined by deducting the amount due on the notes from what has been paid in cash. *Hines v. Mutual L. Ins. Co.* (Ky.), 25 Ins. L. J. 555; see *Hazen v. Mass. Mut. L. Ins. Co.*, 170 Mass. 254; *Kellner v. Mutual L. Ins. Co.*, 43 Fed. Rep. 623.

to a policy to annul it is valid, and when the insured surrenders his policy and it is agreed that it shall be cancelled, the insured ceases to be a member, and is not liable for *subsequent* assessments.¹ If the policy permits the assured to cancel, a delivery of the policy to an agent authorized to cancel policies, with the statement that the surrender is made for cancellation, terminates the policy, and a subsequent redelivery by the agent with knowledge of an intervening loss will not revive it.² Where a policy was delivered up to be cancelled on condition that the risk be placed in another company, and a loss occurred after the agent had written "cancelled" across the old policy, but before the new policy had been applied for, it was held that the company was liable, as the condition on which the cancellation was to be made had not been fulfilled.³ If a policy under which the assured may cancel is not tendered for cancellation until after it has been forfeited by other insurance, the unearned premiums cannot be recovered, for the policy and all its terms were dead in law before the tender.⁴ The assent of a partner to receive an offered substitution of a policy in another company will bind the substituted company to the firm, though loss occurs before the old policy is surrendered or the new one delivered.⁵

§ 70. **Accident Insurance; Insurance Ticket.** — In some branches of accident insurance — railway passengers, for instance — it is the practice to issue tickets, the nature of the business being such that there is not the time to follow the routine usual in other kinds of insurance. These tickets⁶

¹ [Akers v. Hite, 94 Pa. St. 394.]

² [Crown Point Iron Co. v. Aetna Ins. Co., 53 Hun, 220.]

³ [Poor v. Hudson Ins. Co., 2 Fed. Rep. 432; 9 Ins. L. J. 428; (N. H.), 1880.]

⁴ [Colby v. Cedar Rapids Ins. Co., 66 Iowa, 577.]

⁵ [Whiteman Bros. v. Amer. Cent. Ins. Co., 14 Lea (Tenn.), 327.]

⁶ The following is a sample of such tickets, styled a "General Accident Ticket:" "The — company of — will pay the owner of this ticket — dollars per week in case of personal injury causing total disability, for a period not exceeding — weeks, or the sum of — dollars to his legal representatives in the event of his death, from personal injury, ensuing within — months from the happening thereof, when caused by any accident while travelling by public or private conveyance, provided for the transportation of passengers in the —, it being understood that the policy covers no description of war risk."

are made out and signed at the company's office, and transmitted to their agents to be sold indifferently to all who apply for them. The sale and delivery by an agent, or by any one in his employ, and the payment of the price, give the owner a valid claim against the company, subject to the conditions set forth in the ticket.¹

§ 70 a. **Renewals. Removals.** — As to the effect of a renewal of a policy there is some confusion, if not disagreement, amongst the authorities. It is generally held to be a new contract, upon the terms and conditions stated in the policy expired, — the old application, in the absence of evidence to the contrary, serving as the basis of the new contract, and as if made at the date of the renewal.²(a) But the renewal may be upon different interests, or interests held in different rights and by different parties, or in other ways the contract may be changed by the circumstances. In such cases the old contract must necessarily be modified, though the conditions may remain the same.³ Consent to the removal of property already insured to another locality, where it is to continue insured, is also a new contract.⁴ [A

¹ *Brown v. Railway Passenger Ass. Co.*, 45 Mo. 221.

² *Peacock v. New York Life Ins. Co.*, 1 Bosw. (N. Y.) 338; affirmed, 20 N. Y. 293; *Martin v. Home Ins. Co.*, 20 U. C. (C. P.) 447; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164; *Brady v. North Western Ins. Co.*, 11 Mich. 425; *Post v. Ætna Ins. Co.*, 43 Barb. (N. Y.) 351. See also *post*, § 190. [The renewal of a policy without any new application stands upon the same grounds as the original. *Witherell v. Maine Ins. Co.*, 49 Me. 200, 203.]

³ *Phelps v. Gebhard Fire Ins. Co.*, 9 Bosw. (N. Y.) 404, 409; *Lancey v. Phoenix Fire Ins. Co.*, 56 Me. 562; *Luciani v. Am. Fire Ins. Co.*, 2 Whart. (Pa.) 167; *Peoria Mar. & Fire Ins. Co. v. Hervey*, 34 Ill. 46. See also *post*, § 190.

⁴ *Rathbone v. City Fire Ins. Co.*, 31 Conn. 193; *Kunzge v. Am. Exch. Fire Ins. Co.*, 41 N. Y. 412.

(a) See *Walker v. American Central Ins. Co.*, 143 N. Y. 167; *Dover Glass Works Co. v. American F. Ins. Co.*, 1 Marvel (Del.) 32; *Bole v. New Hampshire F. Ins. Co.*, 159 Penn. St. 53. See *Jones v. New York L. Ins. Co.*, 168 Mass. 245; *Phoenix Ins. Co. v. Ward* (Tex. Civ. App.), 23 Ins. L. J. 702. Where it was claimed that the insurance was a renewal of a previous policy under an application for two years, for a different amount and period, in another company, it was held that such claim could not be allowed, nor could the application be admitted as evidence. *Sun Mutual Ins. Co. v. Crist* (Ky.), 26 Ins. L. J. 695. And although a verbal renewal is valid, yet such verbal agreement is not binding if it does not fix the amount of the insurance. *Sater v. Henry County Farmers' Ins. Co.*, 92 Iowa, 579.

change of location of the goods or other alteration known to the agent at the time of renewal, binds the company, and the description of position in the original contract is no longer operative. It will be presumed that the company intended to modify the original agreement so as to make it cover the goods where it knew they were, and not to impose on the assured by inducing him to believe that his property was insured, when in fact it was not.¹ A renewal receipt given June 19, 1878, for one year, to wit, from June 10 (the time the original policy expired) to June 10, 1879, does not cover a loss occurring June 16, 1879.² Parol is inadmissible to show that a renewal receipt absolute on its face was a conditional contract.³ A policy running to two persons may be renewed to one of them where the whole interest has centred in that one.⁴ Where a policy for \$1,800 on a mill and \$700 on the machinery was renewed in general terms for \$2,500, it was held that the intent was not to distribute the risk thereafter.⁵

[§ 70 B. **What constitutes a Good Renewal.** — A parol agreement for renewal fixing all terms, and nothing remaining to be done except making a renewal receipt and payment of the premium, binds the company.⁶ In a prior case⁷ a renewal was held insufficient though all the terms were agreed on and the agent said he would make the renewal, but neglected to do so. In 58 Wis. the court distinguished the early case by remarking that the *suit there was on the old policy*, while in the case before it, the action was on the parol agreement to renew, which was as certainly sustainable as the other form of suit would not be. A policy may be renewed by parol,⁸ even though it stipulates that it shall not be.⁹ But a policy under *seal* cannot be continued from

¹ [Ludwig v. Jersey City Ins. Co., 48 N. Y. 379.]

² [Fuchs v. Germantown F. M. Ins. Co., 60 Wis. 286.]

³ [Baum v. Parkhurst, 26 Brad. 127.]

⁴ [Lockwood v. Middlesex Mut. Ass. Co., 47 Conn. 553.]

⁵ [Driggs v. Albany Ins. Co., 10 Barb. 440, 444.]

⁶ [King v. Hekla F. Ins. Co., 58 Wis. 508.]

⁷ [Taylor v. Phoenix Ins. Co., 47 Wis. 365.]

⁸ [Ludwig v. Jersey City Ins. Co., 48 N. Y. 379.]

⁹ [Cohen v. Ins. Co., 67 Tex. 325.]

year to year by a mere parol contract such as a renewal receipt not under seal, such receipts, however, evidence new parol contracts under conditions the same as in the policy.¹ In Georgia a suit on a *parol* renewal of a policy is demurrable.² A naked oral promise of an insurance company's agent to renew a policy when it runs out, is not actionable on the agent's failure to do so.³ (a) It must be alleged that the premium was paid or tendered at the time the old policy expired. If this is done, however, damages may be recovered for failure to renew in accordance with an oral promise. Where A. told the agent of several companies in which he had policies, that he wished insurance for the coming year in a certain amount, and by mistake the agent only renewed policies enough to give him half what he wanted, no claim could be made on the companies whose policies were not renewed. A contract for renewal must be complete, and if anything is left to be determined, as in this case, it is not so.⁴ A conversation with the agent requesting him to renew, and a promise on his part to renew the policy, do not constitute a renewal where no renewal receipt is given, no renewal endorsed on the policy or entered by the agent, or notified to the company, and no premium paid, tendered, or credit arranged.⁵ (b) The policy in this case provided for

¹ [Firemen's Ins. Co. v. Floss & Co., 67 Md. 403.]

² [Roberts v. Germania F. Ins. Co., 71 Ga. 480; Code, § 2794.]

³ [Croghan v. N. Y. Underwriters' Agency, 53 Ga. 109, 111. Dinning v. Phoenix Ins. Co., 68 Ill. 414, 418. In this case also no premium was paid, and the court said that there was *no completed contract*, oral or otherwise.]

⁴ [Johnson v. Com. F. Ins. Co., 84 Ky. 470.]

⁵ [O'Reilly v. Corp. London Assurance, 101 N. Y. 575, 579.]

(a) See *Stewart v. Helvetia-Swiss F. Ins. Co.*, 102 Cal. 218. The insured cannot have the advantage of a custom, as to renewals by agents, of which he has no knowledge or notice. *Nippolt v. Firemen's Ins. Co.*, 57 Minn. 275. In *McCabe v. Aetna Ins. Co.* (No. Dak.), 81 N. W. 426, 430, evidence of a custom on the agent's part, to extend credit for premiums, was held admissible.

(b) These questions are usually matter of fact for the jury. See *Long v.*

North British & Merc. Ins. Co., 137 Penn. St. 335; *Fidelity & Cas. Co. v. Willey*, 80 Fed. Rep. 497; *Baker v. Commercial Union Ass. Co.*, 162 Mass. 358; *New York Lumber Co. v. People's F. Ins. Co.*, 96 Mich. 20. An agent, in renewing a fire policy, may himself care for the renewal premium, and retain the policy until it is paid; in which case the policy is binding upon the insurer. *Fireman's Fund Ins. Co. v. Pekor*, 106 Ga. 1; *Baker v. Commercial Union Ass.*

the manner of its own renewal, making payment of the premium an element, and this was not done. Parol proof that a contract of insurance was actually made before a loss occurred, though executed and delivered and paid for afterwards, is inadmissible.¹ The plaintiff claimed that he could abandon the written contract and rely on the prior verbal agreement of renewal, which was made before loss, but the court held otherwise. The parol agreement that precedes the issuance of a policy in the first place fixes the terms of the contract, and is held to be a valid insurance covering a loss that may occur before issue of the policy, and a contract of renewal should be put on the same basis; but in this case the evidence of a parol contract does not seem good, and the policy merging the contract only took effect by its terms from its date. Moreover, in this case there was little doubt that the assured knew of the loss at the time he applied for the policy, and that his attempt to prove a prior oral agreement was a mere makeshift to consummate his fraud. (a) The doctrine of the case, however, is too broad if we quote it without remembering the peculiar facts. There is no

¹ [Insurance Co. v. Lyman, 15 Wall. 664, 670.]

Co., 162 Mass. 358. Where the agent who had issued the former policy signed a renewal policy and authorized it to be filled, and afterwards forwarded it as a valid contract to the general agent without calling for the renewal premium, and the agent of the insured, on applying for a renewal at the expiration of the first policy, was informed what had been done, the renewal contract was held binding on the company. *Lum v. United States F. Ins. Co.*, 104 Mich. 397. But where the cashier of the insured was also agent of the insurer, with authority to issue policies, and was directed by the manager of the insured to renew the policy, which he promised but failed to do, and the cashier testified that he intended to renew, and supposed he had done so, it was held that there was no valid contract of renewal. *Idaho Forwarding Co. v. Fire-*

man's Fund Ins. Co., 8 Utah, 41, 43; *Zigler v. Phoenix Ins. Co.*, 82 Iowa, 569. When the agents of an insurance company are duly authorized to solicit and make contracts of insurance, and deliberately represent to the assured that a given policy issued by the company has been renewed, and subsequently receive and appropriate money which they have good reason to believe is paid to cover the cost of such extended insurance, the company is estopped to allege, after a loss has occurred, that the policy in question was not renewed. *Int'l Trust Co. v. Norwich U. F. Ins. Co.*, 71 Fed. Rep. 81, 86; *Long v. North British, &c. Ins. Co.*, 137 Penn. St. 335; *American F. Ins. Co. v. Brooks*, 83 Md. 22.

(a) See *Dodd v. Home Mut. Ins. Co.*, 22 Oregon, 3.

doubt that in a proper case good evidence of a prior oral agreement would be received. When an agent of an insurance company has authority to make applications binding until disapproved by the company and communication of the disapproval to the assured, an agreement by him to extend an expired policy is valid until disapproved, and if the property burns before notice of disapproval reaches the assured, the company is liable.¹ All negotiations and contracts are deemed to be merged in the policy, and any parol agreement with the agent before issue of the policy, that he shall keep the policy renewed from year to year, giving the plaintiff time with the premiums, does not bind the company, but a definite parol agreement of renewal *in presenti* would be sustained.² On the facts there is really no conflict in the cases. A parol agreement of or for renewal may be made with the same freedom and certainty as a parol agreement of original insurance.]

[§ 70 C. **Revival.** — Nothing can revive a void contract short of a new contract on valid consideration, or conduct amounting to estoppel.³ (a) Where the plaintiffs as agents paid in more money than they owed the company and the

¹ [Leeds v. Mechanics' Ins. Co., 8 N. Y. 351, 357.]

² [Giddings v. Phoenix Ins. Co., 90 Mo. 272, 277.]

³ [N. Y. Cent. Ins. Co. v. Watson, 23 Mich. 486, 488.]

(a) See Dale v. Continental Ins. Co., 95 Tenn. 38; Com'th v. Provident L. Ass'n, 163 Penn. St. 374; Bottomley v. Met'n L. Ins. Co., 170 Mass. 274; Mutual Reserve Fund L. Ass'n v. Hamlin, 139 U. S. 297; Equitable L. Ass. Society v. McElroy, 83 Fed. Rep. 631. As to reinstatement, upon failure to duly pay premiums or assessments for life insurance, see French v. Hartford L. Ins. Co., 169 Mass. 510; Colby v. Life Indemnity Co., 57 Minn. 510; Riegel v. American L. Ins. Co., 153 Penn. St. 134; Reilly v. Chicago Guaranty Fund L. Society, 75 Minn. 377; Knights Templars' L. Ind. Co. v. Jacobus, 80 Fed. Rep. 202; Coburn v. Life Indemnity Co., 52 Minn. 424; Ronald v. Mutual Reserve

Fund L. Ass'n, 132 N. Y. 378; Jones v. Preferred Bankers' L. Ass. Co. (Mich.), 79 N. W. 284; United Security, &c. Co. v. Ritchey, 187 Penn. St. 173. Upon default in paying a premium, when the policy allows opportunity for reinstatement, the assured, if in good health, and acting promptly, is entitled to be reinstated, though then past the age for insuring new members. Lovick v. Providence L. Ass'n, 110 N. C. 93. The policy continues lapsed if the reinstatement is obtained by fraud, and this is not waived by the insurer. Mass. Benefit L. Ass'n v. Robinson, 104 Ga. 256; see French v. Mutual Reserve Fund L. Ass'n, 111 N. C. 391.

surplus was retained, it was held that the company must be treated as having applied the surplus to revive certain lapsed policies of the plaintiffs which were at the time the subject of negotiations for revivor.¹ Representations in a revival certificate warranted to be true as a condition of revival, become part of the contract upon assent to the revival.²

¹ [Kirkpatrick v. South Aus. Ins. Co. (J. C.), 11 App. Cas. 177.]

² [Metropolitan L. Ins. Co. v. McTague, 49 N. J. 587.]

CHAPTER VI.

SUBJECT-MATTER. — INSURABLE INTEREST.

ANALYSIS.

1. Subject-matter :

any *lawful* interest, § 71.

having an appreciable pecuniary value, § 72.

though no market value, § 72.

nor even actual existence, § 72.

the thing or life is not insured, but some person in respect to it, § 72.

life, health, liberty, solvability, fidelity, property, profits, &c., § 73.

2. Insurable interest :

1. Necessity of, § 74.

wager policies (*i. e.* policies without interest) not now sustained,
§ 75.

but reprobated, § 75 A.

“interest or no interest,” § 75.

a policy that is to “be proof of interest” is a wager, § 75.

bets on sex, § 75 A.

on life, § 75 B.

on marriage, § 75 B.

policy of \$3000 to cover a debt of \$70, §§ 75 B, 108.

policy taken out by a man on his own life, payable to any one
he may desire, is not a wager, § 75 B.

2. What constitutes,

The test :

So that insurance does not aim at the protection of any
one in the violation of law, or the forwarding of any ille-
gal purpose,

A has an insurable interest

(1) in his own life and health,

(2) in the life, health, solvability, liberty, fidelity, care, &c., of
another, when its failure would bring upon him a loss of
money or other thing of a nature regarded by the law as
a good consideration for a contract, to the enjoyment of
which money or thing he has a right, or will have it in
the natural and not unlawful course of things.

Blood relationship alone, if very close and of a kind usu-
ally resulting in pecuniary advantage, is sufficient,
especially if there is a legal liability of support.

Generally relationship must be aided by special circum-
stances (see below).

Marriage or an agreement to marry is sufficient (see below).

- (3) In respect to property, present or future, the destruction of which would render him liable to reimburse others, or in relation to which he has any legal or equitable right, great or small, vested or contingent, which in the ordinary and natural course of things would result in advantage to him, so that he has a personal interest in the preservation of the property in regard to which the insurance is made.
- “interest” does not imply “property” in the thing insured, § 74, n.
- interest in a life need not be capable of pecuniary estimate, § 102 A.
- strong ties of blood, § 102 A.
- marriage, § 102 A.
- any reasonable probability of present or future pecuniary advantage is enough, § 76.
- that one may suffer loss of something they have some claim to look for in the natural course of things is sufficient, § 80.
- contingent right sufficient, § 77.
- profits or advantages that would come in the ordinary course of things may be insured, §§ 76, 79, 80.
- but a mere *hope* without a scintilla of present interest is not enough. One has no right to indemnity because he does not receive a *gift* he expects, § 78.
- A present interest in the property or enterprise out of which the profit is to come is necessary, § 77.*
- and when the interest in the goods ceases the policy decays, § 79.
- any benefit reasonably certain to come from the continued existence of the property or life is sufficient, §§ 80 (life), 102 A.
- liability for loss of the property if destroyed is sufficient, common carrier, &c., §§ 83, 94, 94 A, 95.
- even though a debt is that of an infant or the statute of limitations has run on it the creditor may insure it, § 108.
- interest of an insurer, § 98.
- possession under a *claim* of ownership sufficient, §§ 80, 84, 87 A.
- possession under contract of purchase, § 87.
- possession under contract that may ripen into ownership is sufficient, whether purchase-money is paid or not, § 87 A.
- possession under contract of purchase is sufficient though the vendee is in default, and even after an agreement to rescind the contract of purchase, § 87 A.
- defect in title will not avail the company, § 87 A.
- possession under a deed voidable for fraud is sufficient, § 87 A.
- or voidable for want of title in grantor, § 87 A.
- equitable title sufficient, § 86.
3. What is not an insurable interest. (See wager policies above, in 1)
- in life. (See below at the end of 5.)
- in property
- unlawful enterprise, § 71.

- lotteries, § 71.
 - prohibited voyage, § 71.
 - goods intended for illegal sale, § 71.
 - mere hope, § 78.
 - expectation of a gift, § 78.
 - donor or voluntary contributor no insurable interest in the object, § 76 A.
 - voluntary repairs on vessel give none, § 76 A.
 - no insurance of bills payable on a contingency, 76 A.
 - possession under a married woman's agreement to convey is not sufficient to create an insurable interest in a State where such agreement is void, § 87 A.
 - possession by vendor after delivery of goods not sufficient, § 97.
 - a claim of title under a fictitious deed, without actual possession is not sufficient, § 87 A.
 - mere intrusion on land, § 89.
 - right under contract not enforceable is not insurable, § 96.
 - vendee's interest under a contract void by statute of frauds, § 96.
 - verbal contract for purchase of real estate, § 96.
 - mortgage by one having no right to give it, § 96.
4. Who may have an insurable interest.
- In property :
 - any one who is charged with the protection of the property, § 80.
 - or has a right to protect it, § 80.
 - or will receive a benefit from its continued existence, § 80.
 - or be liable to loss by its destruction, §§ 83, 94, 94 A, 95.
 - son none in father's property, § 76 A.
 - administrators, § 80.
 - bailee, § 95.
 - a bailee if interested or responsible for loss may insure in his own name, and if not he may still insure for whom it may concern, § 95 A.
 - bailee will hold the funds in trust for owner, § 95 A.
 - builder under contract, §§ 93, 95 A.
 - captors, § 80.
 - cestui que trust, § 82.
 - common carriers, §§ 80, 94, 94 A.
 - though using vessel of another, § 94 A.
 - commission merchant, § 95 A.
 - consignees, §§ 80, 95 A.
 - contractor, §§ 93, 95 A.
 - creditor, §§ 83, 95.
 - debtor in property attached, § 95.
 - disseizor has, § 81.
 - executors, § 80.
 - factor, §§ 80, 95 A.
 - guarantor, §§ 82, 97.
 - hirer, § 82.
 - indorser, § 82.
 - holder of note, § 97.

husband in wife's property, § 81.
 husband in homestead, § 81.
 innkeeper, § 80.
 insolvent has, even in goods concealed from creditors,
 §§ 81, 92, n.
 intruder, § 89.
 landlord in goods of tenant liable to distress for rent, § 84.
 lessee, § 84.
 lessor, §§ 84, 85.
 master of ship, § 94 A.
 mortgagee, §§ 80, 82, 83, 96.
 mortgagor has, though property mortgaged to full value,
 if he is liable for the debt, even after he has sold the
 equity of redemption, § 82.
 forfeiture of the property for violation of law or unlawful
 foreclosure will not avail the company, § 82, n.
 one having a lien for advances or otherwise, §§ 82, 93.
 one having a claim in the nature of a lien, § 93.
 one having an equitable lien with possession, § 93 A.
 one having an equitable interest, §§ 86, 93 A.
 one having possession under claim of title, §§ 87, 87 A.
 part owner responsible for whole, § 94 A.
 pledgee, §§ 80, 82, 93 A.
 pledgor, § 82.
 railroad liable for destruction by sparks, § 94.
 stockholder, § 90.
 surety, § 82.
 tenant in common, § 81.
 trustee, §§ 80, 83.
 vendee in possession, §§ 83 a, 87, 88, 96.
 vendor before delivery or complete sale has, §§ 83 a, 88, 97.
 vendor may insure in name of *vendee* though the goods
 are not separated, § 83 a, note.
 warehouseman, §§ 80, 95 A.
 wharfinger, §§ 80, 95 A.

5.

In life:

betrothed girl in life of future husband, § 107 a.
 creditor may insure life of debtor, §§ 102 A, 108, 109.
 only entitled to indemnity, § 108.
 but he has been allowed to hold the excess, § 108.
 has interest even when debtor is an infant, § 108.
 or statute of limitations has run against the debt, § 108.
 insurance far beyond the debt will be void, § 108.
 employee in employer's life, § 109 c.
 father, in life of son or daughter, §§ 104-107.
 husband in wife's life, § 107 C.
 master in servant's life, § 109 c.
 mother in life of son, § 107 t.
 one having reasonable expectation of pecuniary advantage
 from the continuance of the life, § 102 A.
 as in case of one contracting to do work, § 109 b.
 parent in life of child, §§ 102 A, 103-107.

partner in copartner, § 109 a.
 sister in brother (*in loco parentis*), §§ 103-107.
 surety, § 102 A.
 trustee, § 111.
 wife in life of husband, § 107 b.
 one related by strong ties of blood, §§ 102 A-107.
 relationship not sufficient.
 brother in life of brother as such, no, § 107 s.
 daughter in life of mother, no, § 103 A.
 granddaughter in life of grandfather, no,
 § 103 A.
 nephew in uncle, no, § 107 s.
 in aunt, no, § 103 A.
 son-in-law in life of mother-in-law, no, § 103 A.

6. Duration :

 general rule, an interest at time of insurance and at loss both
 necessary, §§ 100, 100 A.
 cessation of interest before loss generally destroys the right of
 recovery, §§ 79, 100, 100 A.

 but there may be cases where the company should be held
 and the insured treated as a trustee for the one who
 has really experienced a loss, § 100 A.

 this is especially likely to happen in case of life insurance,
 as where a creditor insures the life of the debtor, and
 the debt is paid before the debtor dies. Here the
 creditor should recover on the policy, otherwise he
 will lose his premiums and the company escape a risk
 fairly undertaken. But he should hold the excess of
 funds above indemnity in trust for the estate of the
 debtor, §§ 100 A, 108, 115-117.

in England, if the insured has an interest at the time of the
 contract of insurance it is sufficient to sustain the policy,
 though his interest may cease before death of the party
 whose life is the risk. At common law a life policy was
 good without *any* interest, and the statute (14 Geo. III.
 c. 48) only requires an interest at the inception of the con-
 tract. The rule is certainly just, that, in the case of a
 valued life policy, holds the parties to the original agree-
 ment made upon a fair estimate of the interest of the
 insured at that time. The insured continues to pay pre-
 miums upon the basis of that interest, and the insurer
 should be liable on the same basis. If a debtor whose life
 was insured by paying the debt terminated the creditor's
 policy, the latter might lose as much or more than the
 debt in premiums and interest. Under such a rule the
 creditor must lose either the original debt or his pre-
 miums, *i. e.* he must be a loser any way, §§ 115-116, 108,
 100 A.

in Massachusetts, if the interest in the insured life terminates
 after payment of two annual premiums, the policy be-
 comes payable at a fair surrender value. Public Statutes,
 § 719.

interest acquired after insurance, but before loss, should sustain policy if company treats it as valid after knowing facts, § 100 A, authority *contra*, § 100 A.

subsequently acquired goods, may certainly be covered, §§ 100, 101.

7. Continuity of interest is not necessary. In the absence of express stipulation an interruption that ends before loss is not fatal, but only suspends the policy, like a temporary breach of condition, § 101.

8. Miscellaneous :

insurance of good and bad interests or interest, and no interest, in same policy *good pro tanto*, § 74.

unless the contract is expressly or by its nature entire, § 74.

insurable interest a question of law, on the facts proved, § 76, n. company's knowledge of no interest immaterial, § 81, n.

assignee of life policy, § 110.

beneficiary, § 112 ; his name must appear on the policy in England, § 113.

one without interest cannot take out a policy on the life of another, but a man may take out a policy on his own life and make it payable to whom he pleases, or assign it to any one. A man's care for his own life is sufficient guarantee that he will not jeopardize it, and if his activity and consent is required to make a good policy, the reason of the law is satisfied whoever pays the premiums. There is some dispute about this, but it is plain common sense, and there is good authority for it, §§ 110, notes, 112 ; *contra*, § 110, n.

life policy *usually* a valued one, § 114.

§ 71. **What may be Insured.** — One may insure that in which he has an interest, and which the law does not forbid to be insured. There are certain unlawful enterprises in which property may be embarked, but, being unlawful, the law will not uphold any contract of insurance or other contract in favor of them, which has for its purpose to aid or in any way promote the success of such enterprises by protecting the property embarked therein.¹ Of this kind of enter-

¹ [Insurance on a voyage prohibited by the *home* sovereign is void : *Richardson v. Marine Ins. Co.*, 6 Mass. 101, 111 ; but not one merely in violation of foreign trade laws or the law of nations in respect to contraband of war. Insurance will not be supported to forward an illegal purpose. Goods intended for illegal sale cannot be insured. But if nothing illegal appears in the purpose of the contract, mere collateral acts, as illegal selling of liquor, will not avoid the policy. The nature and purpose of the insurance, whether collateral to or in aid of a violation of the law, is to be submitted to the jury. *Carrigan v. Insurance Co.*, 53 Vt. 418.]

prises the slave-trade is an example. The same may be said of lotteries, where lotteries are unlawful. Neither will insurance protect property which it is unlawful to have. Whatever the law discourages and disapproves of, whether by special statute or upon general principles enforced by the common law in the interest of good morals, good order, and general public policy, will not be fostered or encouraged by insurance.¹

§ 72. Subject to the limitation stated in the preceding section, whatever has an appreciable pecuniary value, and is subject to loss or deterioration, or of which one may be deprived, or which he may fail to realize, whereby his pecuniary interest is or may be prejudiced, may properly constitute the subject-matter of insurance.² (a) It may have neither a corporeal existence, nor marketable value, nor an actual but only a potential being; for it is not so much the right, thing, or expectancy which is insured, as the possessor himself, against the loss or damage which unforeseen events may bring thereto. When, therefore, the subject-matter of insurance is termed, as it frequently is, the aliment of the contract, it is not to be understood that this aliment is something upon which the contract fastens and feeds, to

¹ Boulay-Paty, Cours de Droit Com. tit. x. § 5, who cites Kuricke, Diatr. Assec. Assecurari possunt omnia quæ assecurari nec de jure, nec de consuetudine, quæ vim juris habet, prohibentur. Mount *et al. v. Waite*, 7 Johns. (N. Y.) 434; Lord *v. Dall*, 12 Mass. 115; *ante*, § 7.

² Pardessus, Cours de Droit Com., 589, 2 & 4.

(a) An insurable interest need not be personal, or founded on an absolute title; it may exist in favor of a trustee, administrator, agent, mortgagee, &c. It must be such an interest that pecuniary loss will result to the assured from the destruction of the property. Rochester Loan Co. *v. Liberty Ins. Co.*, 44 Neb. 537; Hanover F. Ins. Co. *v. Bohn*, 48 Neb. 743; Hartford F. Ins. Co. *v. Keating*, 86 Md. 130. An agent, who is by contract entitled to a percentage of the receipts and profits of the insurance business written by him, has an insurable interest in the risks written by him as such agent, and may in-

sure his interest in the profits on such risks in another company. *Hayes v. Milford M. F. Ins. Co.*, 170 Mass. 492. See *Graham v. American F. Ins. Co.*, 48 S. C. 195. Agents, commission merchants, carriers, and the like, who have the custody of personalty, and are responsible therefor, may insure it in their own names, and are entitled to recover the full value of the property. *Western & Atlantic Pipe Lines v. Home Ins. Co.*, 145 Penn. St. 346; *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1; *Roberts v. Firemen's Ins. Co.*, 165 Penn. St. 55; *Ins. Co. of North America v. Forchheimer*, 86 Ala. 541.

which it clings, and from which it is inseparable. In popular language, a house is said to be insured; but in point of fact the owner is insured on, or in respect of, the house, or, in other words, against any loss which may happen to him while he is owner, and because of his ownership, absolute or qualified. When this ownership ceases, the property also ceases to furnish aliment for the contract, and it dies. It is the union between the two — between the person with whom the contract is made and the subject-matter about which it is made, in the relation of the possessor to the thing possessed — that keeps alive the contract. And when this union is permanently sundered before loss or the event insured against happens, the contract loses its vitality. A transfer of the property and an assignment of the policy is not a prolongation of the life of the contract, but a new contract with another person about the same subject-matter. So in life insurance the aliment of the contract is the interest which the insured has in the preservation of the life insured, and the protection is against loss to the insurer in case of cessation of the life.¹

§ 73. Under these qualifications the contract may embrace not only personal property and real estate, but the lives of animals, among which slaves are included for this purpose; the life, health, and personal liberty of man; the solvability of a debtor; the payment of a note at maturity;² the fidelity of a servant; expected profits; the damages to which growing crops are exposed from frosts and storms; the risk of death or injury by accident to the person in travelling or otherwise; lottery tickets, where lotteries are permitted; the risk of loss of property by the capture of a fort by an enemy;³ the danger of loss by dishonesty, fraud, and theft, or by the nonpayment of rent, interest, or income, or by the invalidity of titles, or by the death of one upon whom depends the continuance of pecuniary support or

¹ *Wilson v. Hill*, 3 Met. (Mass.) 66; *Carpenter v. Prov. Wash. Ins. Co.*, 16 Peters (U. S.), 495. See also *ante*, § 6.

² *Ellicott v. United States Ins. Co.*, 8 Gill & Johns. (Md.) 166.

³ *Carter v. Boehm*, 3 Burr. 1905.

assistance; and, in general, "it is applicable," to use the language of Mr. Justice Lawrence,¹ "to protect men against uncertain events which may in any wise be of disadvantage to them." In most of these instances the contract has been successfully applied. Of their respective peculiarities we shall have occasion to treat more at length hereafter. The practice of insuring crops is much in vogue in France;² and guaranty insurance, as it is called, instituted as a substitute for private suretyship, to aid persons in obtaining places of trust and responsibility, and to protect employers from the unfaithfulness of employés, has met with some success in England.

§ 74. **Insured must have a Lawful Interest.** — When there is no interest at all to be protected, a policy of insurance will be invalid, as counter to the spirit and purpose of the contract, as well as against public policy.³ Insurance is made for the benefit and protection of legitimate business and purposes, and not that persons unconcerned therein, and without any interest in the property or event, should profit thereby. And although innocent wagers were once sustained, the courts will not now waste their time in discussing the question whether what is substantially a wager ought or ought not to be upheld upon any grounds. Under the influence of a healthy public sentiment they have become impatient of investigating disputes founded upon any species of gambling, and almost without exception refuse to enforce a contract supported by such a subject-matter.⁴ Insurance of interests prohibited by law, and insurance without interest, if included in the same policy with interests which may be lawfully insured, do not vitiate the policy, except as to the

¹ *Lucena v. Crauford*, 2 B. & P. New Rep. 269, 301.

² *Pardessus*, *Droit Com.*, 589.

³ [G. cannot insure the property of H. ; *Henning v. Western Ass. Co.*, 77 Iowa, 319.]

⁴ *Sadler Co. v. Badcock*, 2 Atk. 554 ; 19 Geo. II. c. 37 ; *Kent v. Bird*, Cowp. 583 ; *Amory v. Gilman*, 2 Mass. 1 ; *King v. State Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 1, 10 ; *Pritchett v. Insurance Co. of North America*, 3 Yeates (Pa.), 458, 464 ; 3 Kent, Com. 278 ; *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y. 516 ; *Fowler v. New York Indemnity Ins. Co.*, 26 N. Y. 422 ; *Freeman v. Fulton Fire Ins. Co.*, 38 Barb. (N. Y.) 247 ; s. c. 14 Abbott, Pr. Cases, 398.

prohibited or non-existent interests. It remains valid for so much as constitutes a legitimate insurable interest. If, however, where several parcels of property, separately valued, the premium being a single sum, are insured by a policy by its terms made void if the true title be not stated, the title of either parcel be untruly stated, there can be no recovery for the loss of either parcel, since the contract is an entire one.¹ [The term "interest" does not necessarily imply property in the subject of the insurance.²]

§ 75. **Wager Policy** (*continued*). — Although policies of insurance made for the benefit of parties who have no interest in the property or event which constitutes the subject-matter of insurance are inconsistent with the true principles of insurance, yet the courts, in the early history of the contract, in cases of marine insurance, "interest or no interest," looking upon such policies as in the nature of an innocent wager, and therefore sustainable at common law, manifested a disposition to uphold them.³ But both in England and in some of the States of this country the legislative powers have intervened and expressly declared the invalidity of policies without interest. And even when this intervention has not taken place the courts now, nearly without exception,⁴ hold such policies void, not only because in contravention of the fundamental object of the contract, — indemnity, since where

¹ Day v. Charter Oak Fire & Mar. Ins. Co., 51 Me. 91. See also *post*, § 189.

² [Buck v. Chesapeake Ins. Co., 1 Pet. 151, 163.]

³ "There is some strange language," says Lord Eldon — *Lucena v. Crauford*, 2 New Rep. (5 Bos. & Pul.) 322, — "to be found in our books respecting wagering and valued policies, the latter of which, though frequently in effect wagering policies, have been permitted because it has been supposed that the convenience of them is greater than would result from the prohibition of them." [When there is insurance, "interest, or no interest," the company is not permitted to prove no interest in the assured. *Depaba v. Ludlaw*, 2 Com. Rep. 361.]

⁴ In New Jersey, in 1854, it was said, though the case did not require the point to be decided, that a life policy without interest is an innocent wager and good at common law. *Trenton Mut. Life & Fire Ins. Co. v. Johnson*, 4 Zab. (N. J.) 576; *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y. (9 Smith) 516. And perhaps the same would be held in Rhode Island. *Mowry v. Home Ins. Co.*, 9 R. I. 346. See also *Chisholm v. National Capitol Life Ins. Co.*, 52 Mo. 213; and *post*, § 107. In Ireland, wagering policies are valid. *Shannon v. Nugent*, Hayes, 536; *Schweiger v. Magee*, Cooke & Al. 182. [Wager policies are not illegal in Ireland. *Keith v. Protection Marine Ins. Co. of Paris*, Ir. L. R. 10 Ex. 51.]

there is no interest there can be no loss, and where there is no loss there can be no indemnity, — but because, when the insured has nothing to lose, but everything to gain, by the happening of the event insured against, it would be dangerous and demoralizing to subject the insured to so great a temptation to destroy the property or the life upon which the insurance is effected. A sound public policy will not sanction any such temptation. And, indeed, the nearer the insured is brought by the terms of the contract into such a position that he can in no event be the gainer, the more nearly will the contract conform to the true principles of insurance. In accordance with this view, the better class of insurers not only take the smallest risks in proportion to the total value of the thing insured, but exercise the greatest caution lest the total valuation should be fixed at so high a rate as practically to offer to the insured a margin of profit beyond the actual indemnity, in case of loss. [A policy providing that no further proof of interest than the policy shall be required is a wager contract.¹ But exactly to the contrary, it has been held that the words, “policy to be proof of interest,” are not of themselves evidence of a wager policy.²]

[§ 75 A. *Wager Fire Policies; Bets on Sex.* — Insurance, made by one without an interest in the subject-matter, is void.³ Every species of gaming contracts, wherein the insured has no interest, or a colorable one only, or having a small interest much overvalues it in a valued policy, are reprobated both by our law and usage.⁴ By English law an engagement to pay £100 in case Brazilian shares should be done at a certain sum on a certain day, all in consideration

¹ [Keith v. Protection Mar. Ins. Co. of Paris, 10 Ir. L. R. (Ex.) 51.]

² [Clendinning v. Church, 3 Caines, 141, 144.]

³ [Goddart v. Garrett, 2 Vern. 269; Howard v. Lancashire Ins. Co., 5 Russ. & Geld. (Nova Sco.) 172, 173, 178. A contract to insure one who cannot sustain any pecuniary loss by the event insured against is a mere wager policy, and is discouraged by the law. Spare v. Home Mut. Ins. Co., 15 Fed. Rep. 707; 22 Am. L. Reg. N. S. 409; 12 Ins. L. J. 365, 9th Cir. (Or.) 1883; American Basket Co. v. Farmville Ins. Co., 8 Rep. 744, 4th Cir. (Va.) 1879.]

⁴ [Pritchett v. Ins. Co. of N. A., 3 Yeates (Penn.), 458, 464; Hoit v. Hodge, 6 N. H. 104, 105.]

of forty guineas, is a policy of insurance void under the statute, since plaintiff has no interest in the event.¹ Where the policy provided that it should be void, if the interest of the assured was other than the sole, entire, and unconditional ownership, unless so stated, it was held avoided when the assured described the property as "his," but in reality a third party had bought it under a mechanic's lien and placed it in the assured's name (which proceeding was void), and later the third party procured another title by sheriff's execution, and himself acted as agent of assured to place the insurance. The assured had *no* interest.² A policy upon the sex of a person is a wagering contract within the statute of 14 Geo. III. cap. 48, and void.³

[§ 75 B. *Wagering Policies on the event of Death or Marriage void.* — Wager policies are void on grounds of public policy.⁴ A policy procured on life of another without interest in it is void.⁵ One cannot *himself* effect insurance on the life of another in which he has no interest.⁶ B. may insure his own life for C., but C. cannot insure B.'s life unless he has a pecuniary interest in it.⁷ One who has no insurable interest in the life of another cannot obtain membership for the latter in a mutual company so as to gain insurance upon his life.⁸ In *Mutual Life Ins. Co. v. Allen*,⁹ Judge Allen said, "To prevent this from being void, as a mere wager upon the continuance of a life in which the parties have no interest except that created by the wager itself, it is necessary that the assured should have some pecuniary interest in the continuance of the life insured." To procure a policy for \$3,000 to cover a debt of \$70 is of itself a mere wager.¹⁰ An

¹ [Patterson v. Pawell, 9 Bing. 320.]

² [Porter v. Aetna Ins. Co., 2 Flip. (U. S.) 100, 102.]

³ [Roebuck v. Hammerton, Cowp. 736.]

⁴ [White v. Equitable Nuptial Benefit Union, 76 Ala. 251.]

⁵ [Rombach v. Piedmont, &c. L. Ins. Co., 35 La. An. 233.]

⁶ [Amick v. Butler, 111 Ind. 578.]

⁷ [Bloomington Mut. Ben. Ass. v. Blue, 120 Ill. 121 ; Martin v. Stubbings, 126 Ill. 387.]

⁸ [Elkhart Mut. Aid, &c. Ass. v. Houghton, 98 Ind. 149.]

⁹ [138 Mass. 27.]

¹⁰ [Cammack v. Lewis, 15 Wall. 643, 647, 648.]

agreement to give defendant the exclusive right of carrying marriage benefit insurance on the plaintiff is a wagering contract and void.¹ A policy payable to the one who holds the next number to the deceased is a wager and illegal.² A policy taken out by a man *on his own life* and payable to any one else he may desire, is not a wagering policy, nor within the condemnation of 14 Geo. III. cap. 48.³ (a)]

§ 76. **What constitutes an Insurable Interest.** — As to what amounts to an insurable interest there has been much discussion in the courts, without hitherto arriving at any satisfactory definition. It may be said generally, however, that while the earlier cases show a disposition to restrict it to a clear, substantial, vested pecuniary interest, and to deny its applicability to a mere expectancy without any vested right, the tendency of modern decisions is to relax the stringency of the earlier cases, and to admit to the protection of the contract whatever act, event, or property bears such a relation to the person seeking insurance that it can be said with a reasonable degree of probability to have a bearing upon his prospective pecuniary condition.⁴ An insurable interest is

¹ [James v. Jellison, 94 Ind. 294.]

² [People v. The Golden Rule, &c., 114 Ill. 34; Golden Rule v. The People, 118 Ill. 492.]

³ [North Amer. L. Ass. Co. v. Craigen, 13 Can. S. C. R. 278.]

⁴ It was said in Mitchell v. Home Ins. Co., 32 Iowa, 421, 424, that whether there is an insurable interest is a question for the jury, under proper instructions. But this, in view of the universal current of authorities, can only mean that the court are to say that if certain facts are found to be true, then there is, or is not, as the case may be, an insurable interest. In other words, the facts being proved, it is a question of law whether there arises out of them an insurable interest.

(a) This statute is declaratory of the common law, and insurance secured by one who has no interest in the life of the person assured is void as a wager policy. Whitmore v. Supreme Lodge, 100 Mo. 36, 46; Smith v. Pinch, 80 Mich. 332. When, however, it is made to appear that the person obtaining the policy did so in good faith, and not for the mere purpose of speculating on the hazard of a life in which he has no interest, or when one who takes out a *bona-fide* policy on his own life, names

a beneficiary therein, the policy will not be treated as a wager, if not so intended. Campbell v. New England Mut. L. Ins. Co., 98 Mass. 381; Shea v. Mass. Benefit Ass'n, 160 Mass. 289; Kentucky L. & A. Ins. Co. v. Hamilton, 63 Fed. Rep. 93. And to an action on a policy brought by the insured's administrator, the fact that the policy was issued to a beneficiary who paid the premiums, but had no insurable interest, is not a defence. Brennan v. Prudential Ins. Co., 148 Penn. St. 199.

sui generis, and peculiar in its texture and operation. It sometimes exists where there is not any present property, — any *jus in re* or *jus ad rem*. Yet such a connection must be established between the subject-matter insured and the party in whose behalf the insurance has been effected as may be sufficient for the purpose of deducing the existence of a loss to him from the occurrence of an injury to it.¹

[§ 76 A. *No Insurable Interest*. — The fact that a turnpike company contributes to the erection of a county bridge, gives it no insurable interest therein in the absence of proof that the contribution was legally compulsory.² The owner of the cargo of a vessel who voluntarily makes repairs on the vessel, has not an insurable interest in the vessel.³ Voluntary repairs belong to the vessel and vest in its owner. If a son takes a policy on the property of his father upon a verbal understanding with the father that the money is to be for his benefit, the idea being to protect the proceeds from the father's creditors, there can be no recovery on the policy. The son cannot sue, for he had no insurable interest, and the father cannot, for the policy is limited to the son, and it is not competent to prove the parol agreement that the insurance was to be for the father's benefit.⁴ When the policy purported to insure bills of exchange, which were in reality but rights to obtain money on the contingency of the arrival of a ship at a certain place, and not true bills, the policy was held of no avail, the subject-matter not being open to insurance.⁵]

§ 77. *Insurable Interest (continued)*. — The question, what constitutes an insurable interest, was much discussed, but not decided, as long ago as 1806, in a noted case in which the several judges who gave their opinions seem to have given the matter their careful consideration. Their conflicting views very well illustrate the difficulties of the question. The facts in the case were as follows: Certain ships,

¹ *Warren v. Davenport Fire Ins. Co.*, 31 Iowa, 464, 465.

² [*Farmers' Mut. Ins. Co. v. Turnpike Co.*, 122 Pa. St. 37, 44.]

³ [*Buchanan v. Ocean Ins. Co.*, 6 Can. 318, 329.]

⁴ [*Baldwin v. State Ins. Co.*, 60 Iowa, 497.]

⁵ [*Palmer v. Pratt*, 9 Moore, 358, 366.]

with their cargoes, belonging to subjects of the United Provinces, by direction of the admiralty had been seized by a British man-of-war and ordered home. The defendants in error were by statute made commissioners, with authority to take into their possession and under their care, and to manage, sell, or otherwise dispose of to the best advantage, all such ships and cargoes as had then been or might thereafter be detained in or brought into the ports of the United Kingdom, and had accordingly insured these ships and cargoes; but before arriving at any port of the United Kingdom they were lost. The question was whether the defendants in error had an insurable interest. And it was said on the one side, that though it were conceded that the commissioners had no scintilla of right in possession or reversion, yet they had a contingent interest founded on the statute, their commission, and the seizure, which made it their duty by all lawful means to provide for the preservation of the property till they should come into possession; that a contingent interest is sufficient,¹ and a vested interest is not necessary; that nothing stood between the commissioners and the vesting of the contingent interest but the perils insured against, and, in fact, they lost by the perils of the sea what, but for those perils, would have vested in them absolutely; that though an interest may be prevented from vesting by other events than the perils insured against, as by the countermand of a consignor, yet this possibility of countermand will not take away the right from the consignee to insure, and that where there is an expectancy coupled with a present existing title, there is an insurable interest; that inchoate rights, such as freight, respondentia, and bottomry, and wages (though the insurance of the latter is universally prohibited on grounds of public policy), founded on subsisting titles, lands, charter-parties, and agreements, are insurable; that the object of insurance is to protect men against uncertain events which may in any wise be of disadvantage,

¹ [Though the assured's interest in personal property is slight or contingent yet if it was fairly represented to the insurance company at the time of the contract, he may recover. *Fenn v. New Orleans Mut. Ins. Co.*, 53 Ga 578, 579.]

not only those persons to whom positive loss may come by such events, occasioning the deprivation of that which they may possess, but those also who, in consequence of such events, may have intercepted from them the advantage or profit which, but for such events, they would acquire according to the ordinary and probable course of things, that though a man must somehow or other be interested in the preservation of the subject-matter exposed to perils, yet to confine the contract to the protection of the interest which arises out of property is adding a restriction to the contract which does not arise out of its nature; that a man is interested in a thing, to whom advantage may accrue or prejudice may happen from the circumstances which may attend it, and whom it concerneth that its condition as to safety or other quality should continue; that interest does not necessarily imply a right to the whole or a part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to or concern in the subject-matter of insurance, which relation or concern, by the happening of the perils insured against, may be so affected as to produce damage, detriment, or prejudice to the person insuring; and when a man is so circumstanced with respect to matters exposed to risks or dangers as to have a moral certainty of advantage or benefit but for those risks or dangers, he may be said to be interested in the safety of the thing; that to be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence or prejudice from its destruction; and that the property of a thing and the interest derivable from it may be very different, the price being generally the measure of the first, while by interest in a thing every benefit and advantage arising out of or depending on such thing may be considered as being comprehended.¹

§ 78. On the other hand, it was said that the mere naked expectation of acquiring a trust or charge respecting property without a scintilla of present interest, either absolute

¹ *Cranford v. Hunter*, 8 T. R. 13; *Lucena v. Cranford*, 3 Bos. & Pul. 75; s. c. H. of L. 2 New Rep. (5 Bos. & Pul.) 299; s. c. 1 Taunt. 324.

or contingent, in possession, reversion, or expectancy, in the proper legal sense of the word, can be no foundation for an insurable interest; that that intermediate thing between a strict right, or a right derived under a contract, and a mere expectation or hope, which is said to constitute an insurable interest, and which is sometimes termed a moral certainty, is so shadowy as to be totally incapable of legal definition; that what is the difference between a moral certainty and an expectation no one can tell; and that in point of fact there can be no insurable interest where there is no right in the property, or a right derivable out of the property by virtue of a contract relative thereto, which, in either case, may be lost upon some contingency affecting the possession or the enjoyment of the party having the property or right; and that an expectation of a grant or trust or possession, founded upon great probability, is not an insurable interest, nor would it be, whatever might be the chances in favor of the expectation. In other words, as was tersely said by Lord Ellenborough in a subsequent case while discussing the same question, "a man has no right to an indemnity because he has lost the chance to receive a gift."¹

§ 79. **Expected Profits.** — Expected profits may be insured² both in this country and England, though the rule in France is different, where only an acquired profit may be insured. But the insured must have an interest in the property out of which the profits are expected to proceed, and the profits

¹ *Ibid.*; *Routh v. Thompson*, 11 East, 428. In this discussion were engaged on one side or on the other, most of the judges of the different courts, and amongst them some of the ablest that ever adorned the British judiciary; and in its different stages the cause will be found to be an invaluable storehouse or learning upon this much-vexed question of insurance law, which will abundantly reward the most careful perusal. See also *De Forest v. Fulton Fire Ins. Co.*, 1 Hall (N. Y. Superior Ct.), 84. The question was also much discussed in the recent English case of *Ebsworth v. Alliance Ins. Co.*, 8 L. R. (C. P.) 596, in which the court unanimously agreed that a consignee might insure and recover to the amount of his advances; but were equally divided upon the point whether, insuring for himself and other parties in interest, he could recover beyond his interest, — upon which latter point the authorities in this country are decidedly in the affirmative. *Shaw v. Aetna Ins. Co.*, 49 Mo. 578; *post*, § 424.

² [*Eyre v. Glover*, 16 East, 218, 220.]

must be insured as profits.¹ "It is not necessary," says Alauzet,² "to the validity of the contract that the thing exist, and that the interest be born at the moment of the making of the contract. Thus crops may be validly insured against hail and frost or any other risk, even before they are sown; but from the moment when the crop begins to take root or branch, the contract will be perfect and susceptible of execution. Until then it is only a conditional insurance."³ (a) And such expected profits are still insurable though the insured may have no absolute ownership in the property out of which the profits are expected to arise, but merely a right, if he should so elect, to take it on certain terms and conditions, in a certain event; as where one purchases for a consideration, then paid, the right to take a portion of a cargo expected to arrive, on the payment of a certain further sum, if on the arrival he shall so elect.⁴ But though there be an ownership in the property, if before it comes to the possession of the purchaser he becomes insolvent, and the goods are intercepted by the vendor by right of stoppage *in transitu*, there being no longer either property or any expectation of profits thereon, there can be no recovery under the policy.⁵

§ 80. **Insurable Interest, who may have.** — Whoever may fairly be said to have a reasonable expectation of deriving pecuniary advantage from the preservation of the subject-matter of insurance, whether that advantage inures to him personally or as the representative of the rights or interests of another, has an insurable interest. Thus a *mortgagee*, being the owner of a limited interest in the estate, has in

¹ Sun Fire Office v. Wright, 3 N. & M. 819; s. c. 1 A. & E. 621; Barclay v. Cousins, 2 East, 544; Grant v. Parkinson, Park, 402; s. c. Marsh. Ins. 95; Putnam v. Mercantile Ins. Co., 5 Met. 386, 391; Loomis v. Shaw, 2 Johns. Cas. 36; Niblo v. N. A. Fire Ins. Co., 1 Sandf. (N. Y. Superior Ct.) 551; Leonarda v. Phenix Assurance Co., 2 Rob. (La.) 131. [Abbott v. Sebor, 3 Johns. Cas. (N. Y. 39, 44.)]

² Traité Gén. des Assurances, 153; Pardessus, Droit Com., 589.

³ Grant v. Parkinson, 3 Bos. & Pul. 85 n.

⁴ French v. Hope Ins. Co., 16 Pick. 397.

⁵ Clay v. Harrison, 10 B. & C. 99.

(a) See Barry v. Farmers Mut. Hail Ins. Ass'n (Iowa), 81 N. W. 690; Holmes v. Phenix Ins. Co., 98 Fed. Rep. 240.

his own right an insurable interest to the amount of the mortgage debt.¹ So have *executors* an insurable interest in the property of the testator which the executor is bound to protect;² and *administrators* in the like property of the intestate,³ even though, it seems, the personal assets are sufficient to pay the debts;⁴ and *trustees* in property under their charge;⁵ and *sheriffs* in property attached.⁶ So also have *consignees*, *common carriers*, and *supercargoes*, under instructions to land the goods and wait for a market,⁷ or when compensation depends upon the safety of the cargo;⁸ *captors*, having a well-founded expectation that their claim will be allowed;⁹ and *pledgees*, *innkeepers*, *factors*, *common carriers*, *wharfingers*, *pawnbrokers*, *warehousemen*, and, generally, persons charged either specially, by law, custom, or contract, with the duty of caring for and protecting property in behalf of others, or having a right so to protect such property, though not bound thereto by law, or who will receive benefit from the continued existence of the property, whether they have or have not any title to estate in lien upon or possession of it, have an insurable interest.¹⁰ That the person may suffer loss is a sufficient foundation for his claim to an insurable interest.¹¹ Indeed, the law has gone very near to

¹ *Carpenter v. Prov. Washington Ins. Co.*, 16 Pet. (U. S.) 495; *Kellar v. Merchants' Ins. Co.*, 7 La. An. 29; *Addison v. Kentucky, &c. Ins. Co.*, 7 B. Mon. (Ky.) 470.

² *Phelps v. Gebhard Fire Ins. Co.*, 9 Bosw. (N. Y. Superior Ct.) 404.

³ *Herkimer v. Rice*, 27 N. Y. 163. See also *post*, § 448.

⁴ *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119.

⁵ *Insurance Co. v. Chase*, 5 Wall. (U. S.) 509; *Babson v. Thomaston Mut. Fire Ins. Co.*, C. Ct. (Me.), Shepley, J., 4 Ins. L. J. 50.

⁶ *White v. Madison*, 26 N. Y. 117.

⁷ *De Forest v. Fulton Fire Ins. Co.*, 1 Hall (N. Y.), 84, a case full of learning. *Waters v. Monarch Fire & Life Ins. Co.*, 5 El. & Bl. 870; *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Planters' Mut. Ins. Co. v. Engle* (Md.), 9 Ins. L. J. 71.

⁸ *Robinson v. New York Ins. Co.*, 2 Caines (N. Y.), 357; *ante*, § 78, note.

⁹ *Stockdale v. Dunlop*, 6 Mees. & Wels. 224; *Protection Ins. Co. v. Hall*, 15 B. Mon. (Ky.) 411.

¹⁰ *Eastern R. R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 420; *Shaw v. Ætna Ins. Co.*, 49 Mo. 578; *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136; *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77. And see *post*, §§ 89, 90.

¹¹ *Cone v. Niagara Ins. Co.*, 60 N. Y. 619.

holding a lawful possession to be an adequate interest to support the contract.¹

§ 81. *Divers Interests in same Subject-matter.* — Many are the rights giving an insurable interest which different parties may have in the same subject-matter. Of course the owner in fee of real estate may insure, and his interest not only continues after a mortgage, but it even survives a sale of the equity of redemption on execution until his right to redeem under that sale expires.² In personal as well as real property there is an insurable interest while there is any right to redeem.³ So may the owner of a leasehold estate insure,⁴ especially if he own the building;⁵ so may a husband as tenant by the curtesy, after issue born alive, though the wife be only a joint tenant;⁶ and so, too, if he lives with his wife, and shares with her the use of her own separate personal or real property.⁷ [In some states, however, the husband cannot insure his wife's property, having no inter-

¹ *Sutherland v. Pratt*, 11 Mees. & Wels. 296; *Barelay v. Cousins*, 2 East, 544; *Wilson, J., Sherboneau v. Beaver Mut. Fire Ins. Ass.*, 30 U. C. (Q. B.) 472. See also *post*, §§ 89, 97; *Durand v. Thouron*, 1 Port. (Ala.) 238, 251.

² *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40; *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25; *Stephens v. Illinois Mut. Fire Ins. Co.*, 43 Ill. 327; *post*, § 82.

³ *Allen v. Franklin Fire Ins. Co.*, 9 How. Pr. (N. Y.) 501; *Franklin Ins. Co. v. Findlay*, 6 Whart. (Pa.) 483.

⁴ *Sadlers' Co. v. Badcock*, 1 Wil. 10; s. c. 2 Atk. 554; *Niblo v. North American Ins. Co.*, 1 Sandf. (N. Y. Superior Ct.) 551.

⁵ *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 419; *Laurent v. Chatham Fire Ins. Co.*, 1 Hall (N. Y.), 41; *Tongue v. Nutwell*, 31 Md. 302.

⁶ *Franklin Mar. & Fire Ins. Co. v. Drake*, 2 B. Mon. (Ky.) 47; *Abbott v. Hampden Mut. Fire Ins. Co.*, 30 Me. 414; *Harris v. York Mut. Ins. Co.*, 50 Pa. St. 341. And see also *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535. [A husband who has curtesy in property has an insurable interest therein. *Franklin Ins. Co. v. Drake*, 2 B. Mon. (Ky.) 47, 50.]

⁷ *Goulstone v. Royal Insurance Co.*, 1 Fost. & Fin. (N. P.) 276; *Clarke v. Fireman's Insurance Co.*, 18 La. 431; *American Central Insurance Co. v. McLanathan*, 11 Kans. 533. [A husband who with his wife is in the possession and enjoyment of her personal property, and has real estate in which he has an inchoate curtesy, has an insurable interest in the same. *Trade Insurance Co. v. Barracliff*, 45 N. J. 543. Also, an insolvent retains an insurable interest in goods concealed from his creditors. *Goulstone v. Royal Insurance Co.*, 1 F. & F. 276, 279. When a husband insures his wife's separate property as his own, he must in his declaration aver loss of his *right to use*, or he cannot recover, and his policy must insure his interest and not the property which was not his. *Cohn v. Virginia F. & M. Insurance Co.*, 3 Hughes (U. S.), 272, 273.]

est in it.¹ (a)] A tenant in dower may doubtless insure. [A homestead may be insured by the head of the family.² (b)] So the assignee of a bond for a deed of real estate upon which the obligee has made improvements has an insurable interest.³ A disseisor may be considered as the owner, so far as to give him an insurable interest, especially if the disseisee's right of entry is tolled; for if the disseisee has no right to enter, but only a right of action, he is not the absolute owner of the land, — the disseisor is the owner under a title which is defeasible.⁴ Rent is itself a distinct insurable interest, and is not a proper item of loss to enhance the damages under a policy insuring the building.⁵ [A tenant in common may insure his own interest, and is not accountable to his co-tenants for any portion of the in-

¹ [A husband has no insurable interest in property of his wife conveyed to her by him. *Clark v. Dwelling-House Ins. Co.*, 81 Me. 373. So in Indiana the law has deprived a husband of all right to the possession or control of his wife's separate estate, and he therefore has no insurable interest in her property. *Traders' Ins. Co. v. Newman*, 120 Ind. 554. And in Michigan a husband cannot insure in his own name the personal property of his wife, and the policy will be void even though the company knew the facts at its inception. *Agricultural Ins. Co. v. Montague*, 38 Mich. 548, 551. The doctrine of waiver cannot apply. It is fundamental that the assured must have an insurable interest, and it is immaterial that he acted in good faith.]

² [*German-Amer. Ins. Co. v. Davidson*, 67 Ga. 11. The husband has an insurable interest in a homestead occupied by himself and his wife, owned by her and on land in which she has a life estate. *Merrett v. Farmers' Ins. Co.*, 42 Iowa, 11, 14. Where a husband orally gave a homestead to his wife, on leaving her, and she occupied the same and with her own money erected buildings thereon, she has an insurable interest in the homestead. *Rockford Ins. Co. v. Nelson*, 65 Ill. 415, 420.]

³ *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176.

⁴ *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535.

⁵ *Leonarda v. Phoenix Assurance Co. of London*, 2 Rob. (La.) 131. In *McCormick v. Ferrier, Hayes & J.* (Irish Exch.) 12, a verdict was upheld for the whole amount claimed, where suit was brought by two parties holding distinct interests in the same subject-matter, alleging generally that they had an interest, but not alleging it to be either sole or joint. But see *Ebsworth v. Alliance Mar. Ins. Co.*, 8 L. R. (C. P.) 596.

(a) See *Trott v. Woolwich F. Ins. Co.*, 83 Maine, 362; *Horsch v. Dwelling-House Ins. Co.*, 77 Wis. 4; *Diffenbaugh v. Union F. Ins. Co.*, 150 Penn. St. 270.

(b) When the title to a dwelling occupied as a family homestead is

wholly in the wife, the husband's interest therein is sufficient to support an action by them jointly on a fire policy issued to them both. *Webster v. Dwelling-House Ins. Co.*, 53 Ohio St. 558. See *Glaze v. Three Rivers Farmers' M. F. Ins. Co.*, 87 Mich. 349.

insurance money.¹] The same person may hold several interests by distinct rights.² Thus he may have co-existing interests as owner, as trustee, as executor, as legatee, and as surety. And the failure of one interest does not affect the others.³

§ 82. **Mortgagor and Mortgagee; Pledgor; Pledgee; Guarantor; Surety; Hirer.** — A pledgor of goods as collateral has an insurable interest.⁴ So has a *cestui que trust*;⁵ and so has a *mortgagor*,⁶ even though his equity has been foreclosed, so long as the mortgage debt remains unpaid, on account of

¹ [Annely v. DeSaussure, 26 S. Car. 505. In this case the whole of the insurance money was applied in repairing the property.]

² [A person having several interests in the same cargo may protect them all under one policy without expressing their different natures. Carruthers v. Sheddon, 6 Taunt. 14, 18.]

³ Insurance Cos. v. Thompson, 95 U. S. 547; 7 Ins. L. J. 1.

⁴ [If a pledgor of property is in possession, and its loss would leave him still liable on the debt, he has an insurable interest to the full value of the property. Nussbaum v. Northern Ins. Co., 37 Fed. Rep. 524 (Ga.) 1889.]

⁵ Butler v. Standard Fire Ins. Co., 4 U. C. (App.) 391.

⁶ [A mortgagor to full value has still an insurable interest. Higginson v. Dall, 13 Mass. 96, 101. As the loss of mortgaged property diminishes the mortgagor's means of payment, it cannot be said that a mortgage lessens his insurable interest. Guest v. Fire Ins. Co., 66 Mich. 98. The owner of the equity of redemption has an insurable interest equal to the value of the property, even though the mortgage would absorb the whole of it. The embarrassment of a man's affairs may be such as to cover all he owns with debts, but he has not therefore lost interest in his property. Insurance Co. v. Stinson, 103 U. S. 25, 29 (1880). If the property were destroyed the debts would remain, and the debtor would be poorer by just the value of the property lost. It has been held that a mortgage large enough to absorb the value of the buildings does not destroy the insurable interest of the owner, even though he is not personally liable on the mortgage debt. The interest arises from his ownership and his right to redeem. Insurance Co. v. Stinson, 103 U. S. 25, 29. But it is a little difficult to see what substantial interest the mortgagor can have in the preservation of the property under such circumstances, and that is the true test. A mortgagor who has given a bond with the mortgage, and afterward sold the property, has still an insurable interest in its preservation, in order that the debt may be paid out of it. Waring v. Loder, 53 N. Y. 581, 585. An equity of redemption before foreclosure is an insurable interest. Creighton v. Homestead F. Ins. Co., 17 Hun, 78, 80. The mortgagor of a vessel, who has warranted to keep her insured for the mortgagee, has an insurable interest therein which is not destroyed by a subsequent forfeiture for violation of a coasting act. Wilkes v. People's F. Ins. Co., 19 N. Y. 184, 187. The insurable interest of a mortgagor is not divested by an unauthorized foreclosure sale and confirmation which is afterwards set aside. Even though the loss occur after the confirmation, and before it is vacated, the mortgagor may recover. Insurance Co. v. Sampson, 38 Ohio St. 672.]

his liability therefor,¹ and so long as there are facts and equities in the case which might give a right of redemption notwithstanding the foreclosure.² And one who has conveyed away his property to protect another against loss by reason of liability on account of the pledgor or guarantor has an insurable interest certainly before any claim on the liability has accrued, and, no doubt, if such claim has not accrued, as he stands substantially in the position of a mortgagor.³ So where one indorses a note for the accommodation of the maker, with the agreement that the proceeds of the goods for which the note was given shall be paid to him, the *indorser*, with which to pay the note, he has an insurable interest.⁴ So where one becomes liable on a bond for the payment of taxes on the property insured.⁵ So where the plaintiff had made advances from time to time for building a vessel, under a parol agreement that he might hold and sell the vessel to pay his advances, paying a surplus to the borrower, though he never had possession of the vessel, nor any bill of sale or transfer, he was held to have an insurable interest.⁶ So the holder of a mortgage as collateral security for a debt has an insurable interest in the mortgaged property, while the debt for which the mortgage is pledged as collateral remains unpaid.⁷ Successive mortgagees, holding claims upon the same property at the same time, may

¹ *Buffalo Steam-Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 401; *ante*, § 81; *Parsons v. Queen Ins. Co.*, 29 U. C. (C. P.) 188. As to the law in Iowa, see *post*, § 286.

² *Stephens v. Illinois Mut. Fire Ins. Co.*, 43 Ill. 327; *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619.

³ *Smith v. Royal Ins. Co.*, 27 U. C. (Q. B.) 54; *Kronk v. Birmingham Ins. Co. (Pa.)*, 9 Ins. L. J. 26; *Walsh v. Fire Association*, 127 Mass. 383; *Kelly v. Liverpool, &c. Ins. Co.*, 2 Hannay (N. B.), 266.

⁴ *Davies v. Home Ins. Co.*, 3 U. C. (App.) 269, reversing s. c. 24 U. C. (Q. B.) 364. [A surety for the payment of the value of the cargo of a vessel in case of condemnation of the ship, to whom the cargo had been delivered as indemnity, has an insurable interest in the cargo, just as a factor who has a lien on goods in his possession has. *Russel v. Union Ins. Co.*, 1 Wash. 409, 412.]

⁵ *Insurance Co. v. Thompson*, 95 U. S. 547.

⁶ *Clark v. Scottish Imp. Ins. Co.*, 4 Can. Sup. Ct. Rep. 192, reversing s. c. 2 P. & B. (N. B.) 241. See § 93.

⁷ *Sussex County Mut. Fire Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 541; *Mechler v. Phoenix Ins. Co.*, 38 Wis. 665; *ante*, § 80.

each insure their respective interests.¹ [The hirer of a vessel may insure her.²]

§ 83. **Mortgagee; Creditor.** — The amount of interest or its character is not material in determining the question whether a party who attempts to recover under a policy has an insurable interest. A mortgagee's interest, as we have already seen, in the protection of the property as a fund out of which to pay the debt, is undoubtedly insurable;³ and he does not lose that insurable interest, although he sell and assign the mortgage and the note thereby secured, *if he indorse the note*. His responsibility for the debt remaining, he is still interested in the preservation of the property, out of which to pay what has ceased to be a debt due him indeed, but nevertheless a debt due another, which he has assumed in a certain contingency to pay.⁴ [A trustee under a deed of trust in the nature of a mortgage has an insurable interest distinct from that of the mortgagor.⁵ When the assured described the premises as "my house, &c.," — when, in fact, the owner had assigned the property to him in trust to sell and pay the creditors, the assured being one of the latter, it was held that the beneficial interest of the assured entitled him to recover the whole insurance,⁶ at least where his beneficial interest is enough to cover it all.] And a creditor has an insurable interest in the real estate of his insolvent or intestate debtor if the personal assets are insufficient to pay the debts.⁷ [A judgment creditor may insure property he has attached, and apply the proceeds to his own use.⁸ He has also a general insurable interest in the prop-

¹ Fox v. Phenix Fire Ins. Co., 52 Me. 333.

² [Bartlet v. Walter, 13 Mass. 267, 269.]

³ [Under the act of 1881, 44 & 45 Vict. c. 41, a mortgagee may, after the date of the mortgage, insure any part or the whole of the mortgaged property, and the premiums shall be a charge on the property in addition to the mortgage, with the same priority, and with interest at the same rate.]

⁴ New England Fire & Mar. Ins. Co. v. Wetmore *et al.*, 32 Ill. 221; Williams v. Roger Williams Ins. Co., 107 Mass. 377.

⁵ [Dick v. Franklin F. Ins. Co., 81 Mo. 103.]

⁶ [White v. Hudson Riv. Ins. Co., 7 How. Pr. 341, 350.]

⁷ Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47; Herkimer v. Rice, 27 id. 163.

⁸ [International Trust Co. v. Boardman, 149 Mass. 158.]

erty of his debtor, but he cannot recover from the insurer unless he shows that the debtor has not sufficient property left out of which the judgment can be satisfied.¹ (a)]

§ 83 a. **Vendor and Vendee; Without Delivery.** — The purchaser of a number of barrels of oil stored with others, but not separated or identified, has an insurable interest to the amount of goods of the character claimed shown to have been in the building at the time of the fire.² So has the

¹ [Spare v. Home Mut. Ins. Co., 15 Fed. Rep. 707; 8 Sawy. 618; 16 Cent. L. J. 352; 12 Ins. L. J. 365, 9th Cir. (Or.) ; see *contra*, § 93.]

² Mathewson v. Royal Ins. Co., 16 L. C. Jur. (Q. B.) 45; Wilson v. Citizens' Ins. Co., 19 id. 175; Clark v. Western Ass. Co., 25 U. C. (Q. B.) 209. The contrary was held, by a divided court, as to the purchaser of an unseparated lot of wheat in another court. Box v. Provincial Ins. Co., 15 Grant, Ch. 337, 552,

(a) See Burlingame v. Goodspeed, 153 Mass. 24; Tilley v. Conn. F. Ins. Co., 86 Va. 811. When a creditor insures his debtor's life to secure his debt, the amount of his insurable interest is the amount of the debt; the proof of indebtedness must be distinct and satisfactory, but if there is a close or even reasonable equality between the amount due the creditor, including premiums and expenses paid, and the face of the policy, it is not a wager or speculative risk. Warnock v. Davis, 104 U. S. 775; Crotty v. Union Mut. L. Ins. Co., 144 U. S. 621; Givens v. Veeder (N. Mex.), 50 Pac. 316. In determining whether such insurance is a wager, the debtor's expectancy of life, according to the Carlisle Tables, may properly be considered. Ulrich v. Reinoehl, 143 Penn. St. 238; Shaffer v. Spangler, 144 id. 223; McHale v. McDonnell, 175 id. 632. In Ulrich v. Reinoehl, *supra*, it was held that a policy for \$3000 to cover a debt of \$100, may, as matter of law, be declared a wager, when no explanation is given for such apparent disproportion.

A creditor's insurable interest in his debtor's life is only for indemnity and cannot exceed the indebtedness secured, including, if so agreed, the expenses of the insurance. Exchange Bank v. Loh, 104 Ga. 446. But such insurable interest supports the policy, though the

creditor's claim is satisfied before the debtor's death. Manhattan L. Ins. Co. v. Hennessy, 99 Fed. Rep. 64. But such interest is only vital to the insurer, and if it does not object, its absence is by estoppel not fatal as between the assignor and the assignee, or between different claimants. Robinson v. Hurst, 78 Md. 59; Hewins v. Baker, 161 Mass. 320; Hall v. Niagara F. Ins. Co., 93 Mich. 184; Hogue v. Minnesota Packing Co., 59 Minn. 39; Blackburn v. St. Paul F. & M. Ins. Co., 116 N. C. 821; Dixon v. National L. Ins. Co., 168 Mass. 48; Merrill v. Colonial M. F. Ins. Co., 169 Mass. 10. An insured creditor's interest ceases when his claim is paid, and the policy then belongs to the insured's estate. Crotty v. Union M. L. Ins. Co., 144 U. S. 621; see Hicks v. National L. Ins. Co., 60 Fed. Rep. 690. A policy for the benefit of a creditor, "as his interest may appear," relates to his interest as creditor, and not in the insured property; if that interest is equal to or exceeds the amount insured, he can sue upon the policy in his own name, even though he ceases to have an insurable interest. Donaldson v. Ins. Co., 95 Tenn. 280. Creditors have no interest in a fraternal benefit certificate the proceeds of which belong wholly to the designated beneficiary. Fisher v. Donovan, 57 Neb. 361.

transferee for value of a warehouseman's receipt for a certain amount of wheat not separated from a larger amount.¹ A vendor of personal or real property, though he may have contracted to sell the same, has also an insurable interest.² So has a vendee in possession, under a contract that the property shall be his when the note given for the property is paid, and until then shall remain the property of the vendor, before the note is paid.³ When a vendee institutes proceedings for abrogating a contract of sale, and insures pending those proceedings, he has an insurable interest, and may recover although the loss does not happen till the contract is abrogated. Before the abrogation, it is his interest to protect for himself, and after the abrogation it is both his interest and duty to protect, so that he may restore and place the vendor in substantially the same position as he was in before the sale. The effect of the abrogation of the contract was to subrogate the vendor to the assured's right

citing *Sutherland v. Pratt*, 11 M. & W. 296, where it was held that the vendee of goods under a verbal contract could not insure. See also *post*, § 97.

¹ *Todd v. Liverpool, &c. Ins. Co.*, 18 U. C. (C. P.) 192. Though this case was reversed afterwards on appeal, four to three, it was for reasons drawn from statutory considerations, which do not seem to affect the soundness of the general principle decided in the case reversed.

² *McSwiney v. Royal Exch. Ass. Co.*, 14 Q. B. 634; *Acer v. Merchants' Ins. Co.*, 57 Barb. (N. Y.) 63; *Brewer v. Herbert*, 30 Md. 301. [A vendor who has agreed to sell for full value has, pending the contract of sale, a right to insure the premises. *Gill v. Can. F. & M. Ins. Co.*, 1 Ont. R. 347. The owner of a vessel, who has contracted to sell her, has still an insurable interest in her, to her full value: *Stuart v. Columbian Ins. Co.*, 2 Cranch C. C. 442, 443; and not merely to the price agreed on. A vendor, V., who has supplied T. with goods under an agreement, reserving to V. a special property in them, has an insurable interest, and a verdict in his favor will not be set aside because he said on cross-examination that if the goods had been destroyed without insurance the loss would have fallen on T. Such an answer is only V.'s idea of the legal effect of the agreement. *Rumsey v. Merch. M. Ins. Co.*, 4 Russ. & Geld. (Nova Sco.) 220. An executory contract to sell 40,000 hams, to be paid for on delivery, does not change the property, and the vendor by a policy insuring the stock of which the hams were a part, insures them also, and may recover therefor upon loss. *Ætna Ins. Co. v. Jackson*, 16 B. Mon. 242, 267. The vendor of goods, having received the price therefor, and agreed to store them free of charge and to procure insurance in the name of the vendee, stating all the facts to the underwriters, may so insure, although the goods have not been separated from others of the kind in the vendor's stock. *Cumberland Bone Co. v. Andes Ins. Co.*, 64 Me. 466, 470.]

³ *Holbrook v. St. Paul Fire & Mar. Ins. Co.*, 25 Minn. 229. See also *Bicknell v. Lancaster Fire Ins. Co.*, 58 N. Y. 677.

to the proceeds.¹ A vendor of real estate, after articles of agreement and before conveyance, may also insure the full value; and when the policy is upon the buildings and not upon the debt, the insurance is *prima facie* upon the whole legal and equitable interest, and upon the balance of the unpaid consideration.² (a)

§ 84. **Lessor and Lessee.** — The interest of a lessee is based upon his right to the possession and use, his liability to repair or for waste, or his covenant or parol agreement³ to keep insured, and may exist whether he be tenant for years or at will. But the lessee cannot insure lessor's interest, unless under obligation so to do.⁴ In England the incumbent of a benefice, and generally the tenants of ecclesiastical property, whether in possession or not, and other persons bound by custom or otherwise to repair, are considered to have an insurable interest.⁵ A sub-lessee by parol, who rents a building on the leased land, has an insurable interest in the building.⁶ [The lessee of a homestead who has erected improvements has an insurable interest.⁷]

And it seems that a possession under such circumstances that the tenant may be liable as a wrong-doer gives an insurable interest, as appears by the following interesting

¹ *Le Soleil v. Alby*, Dalloz, Jur. Gén., Ct. of Cass. 1868, 1, 38. See also *post*, § 89.

² *Insurance Co. v. Updegraff*, 21 Pa. St. 513.

³ *Lawrence v. St. Mark's Fire Ins. Co.*, 43 Barb. (N. Y.) 479.

⁴ *Hidden v. Slater Fire Ins. Co.*, 2 Clifford (C. Ct.), 266, 268.

⁵ *Bunyon, Fire Ins.*, 17.

⁶ *Mitchell v. Home Ins. Co.*, 32 Iowa, 421; *Fowle v. Springfield, &c. Ins. Co.*, 122 Mass. 191. In *Kelley v. Insurance Co.*, Dist. Ct., Phila., 3 *Bennett Fire Ins. Cases*, Sharswood, J., held that property held by a tenant was in trust, so that if the policy required property held in trust to be insured as such, an insurance by the tenant in his own name would be invalid. The case does not show what the subject-matter of insurance was.

⁷ [*Creech v. Richards*, 76 Ga. 36.]

(a) One who is in possession of realty under a contract to buy it, and who, having made part payments, is entitled to a conveyance upon full payment, has an insurable interest to the extent of the payments made up to the time when the insurance was effected. *Davis v.*

Phoenix Ins. Co., 111 Cal. 409; *Baker v. State Ins. Co.*, 31 Oregon, 41; *Loventhal v. Home Ins. Co.*, 112 Ala. 108. He has also an insurable interest in any building or structures he may be erecting on the land. *Hall v. Niagara F. Ins. Co.*, 93 Mich. 184.

case: The City of New York had leased a plot of ground for the Crystal Palace building to an association which failed, and a receiver was appointed by the court under the statute relating to the dissolution of corporations. The receiver held possession of the property some year and a half after the lease expired, when the plaintiffs entered by force and took possession, and then procured this insurance. The court observed that if the building was to be considered as the property of the lessee at the termination of the lease, the plaintiffs were liable to be charged for its value as wrongdoers, at the suit of the receiver, after they had forcibly ejected him and taken possession thereof. The plaintiffs were in possession under a claim of ownership. The receiver can maintain no action to recover the actual possession of the building since its destruction, and a recovery against the plaintiffs for the value, by way of damages, would vest the ownership in them, even though they acquired no title in it by the conditions of the lease and the expiration of the term. And so on this ground there was an insurable interest.¹ So, too, a landlord has an insurable interest in the goods of his tenant liable to distress for rent.²

§ 85. **Lessor; Buildings erected by Lessee.** — Of course, when a building is erected by the lessee, and reverts to the lessor at the expiration of the lease, an insurable interest exists in the lessor from the time of the reversion.³ So if the lessee has a right to remove the buildings at the expiration of the lease, as their destruction will diminish the lessor's security for rent, he may insure for his protection.⁴

¹ Mayor, &c. of New York *v.* Brooklyn Fire Ins. Co., 41 Barb. (N. Y.) 231.

² Columbia Ins. Co. *v.* Cooper, 50 Pa. St. 331.

³ Mayor, &c. of New York *v.* Exchange Fire Ins. Co., 9 Bosw. (N. Y.) 424; s. c. affirmed, 3 Abb. App. Dec. (N. Y.) 261; Mayor, &c. of New York *v.* Brooklyn Ins. Co., 41 Barb. (N. Y.) 231.

⁴ Miltenberger *v.* Beacom, 9 Pa. St. 198. In *Macarty v. Commercial Ins. Co.*, 17 La. 365, it is said that a donor who has given a deed of his property *inter vivos*, and at the delivery of the deed has by parol agreed with the donees that he shall retain the estate during his life, and does in fact retain it, taking the profits and paying taxes and making repairs, has no insurable interest. But the reasoning of the court is wholly unsatisfactory, and the decision is against the universal current of the modern authorities.

§ 86. **Equitable Title.** — There can be no doubt that one who has a title enforceable in equity has an insurable interest.¹ So where the plaintiff advanced money to a builder, and took his notes, secured by a deed in trust to a third party, in payment, and, the maker of the notes being unable to pay them at maturity, it was agreed that the plaintiff should surrender the notes and take possession of the property, which he accordingly did, with the assent of the trustee, who delivered to him the deed of trust, which at the time insurance was effected he had so held for about two years, it was held that he had an insurable interest.²

§ 87. **Possession; Incomplete Title; Claim in Litigation.** — But insurable interest does not at all depend upon the completeness or validity of the title by which the insured property is held. Thus possession under a contract of sale, upon which partial payment has been made, may give an insurable interest, although the conditions of the contract have been so far violated that, if the breach be insisted on, the contract cannot be enforced, since the contract, notwithstanding the breach of its conditions, may be carried into effect by the parties in interest.³ And this is true, though the vendor, availing himself of the violation of the conditions by the vendee, has resold the property, and is resisting a proceeding in equity brought by the vendee to compel

¹ *Ramsey v. Phoenix Ins. Co.*, 2 Fed. Rep. 429; *Redfield v. Holland, &c. Ins. Co.*, 56 N. Y. 354; *Franklin Fire Ins. Co. v. Martin (Md.)*, 8 Ins. L. J. 134; *Acer v. Merchants' Ins. Co.*, 57 Barb. (N. Y.) 68. See also *post*, §§ 87, 88, 96; *Brewer v. Herbert*, 30 Md. 301. [An equitable interest is a proper subject of insurance. *Hume v. Providence Washington Ins. Co.*, 23 S. Car. 190; *Home Protection Ins. Co. v. Caldwell Bros.*, 85 Ala. 607. One who has an equitable interest in property may insure the same in the name of the legal holder, the proceeds to be payable to himself as his interest may appear, and on loss he may recover the amount of his damage, not exceeding the amount of his insurance. *Harvey v. Cherry*, 12 Hun, 354, 356. An equitable title or interest such as possession under a contract of purchase is sufficient. *Gilman v. Dwelling-House Ins. Co.*, 81 Me. 488. See next section.]

² *Coursin v. Pa. Ins. Co.*, 46 Pa. St. 323.

³ *Tyler v. Aetna Fire Ins. Co.*, 16 Wend. (N. Y.) 385; s. c. 12 id. 507; *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25; s. c. 10 id. 507; *McGivney v. Phoenix Fire Ins. Co.*, 1 Wend. (N. Y.) 85; *Smith v. Bowditch Ins. Co.*, 6 Cush. (Mass.) 448; *Southern Ins. & Tr. Co. v. Lewis*, 42 Ga. 587; *Pettigrew v. Grand River Farmers' Ass.*, 28 U. C. (C. P.) 70.

a conveyance. If this were not so, the property might be destroyed pending the litigation, to the prejudice of the vendee should he ultimately prevail.¹

[§ 87 A. *Contract of Purchase; Claim of Title; Defect in Title.* — The holder of an assigned title bond has an insurable interest in the premises.² "Possession of property under a subsisting executory contract that may ripen into ownership constitutes an insurable interest, whether the purchase-money is paid or not, and will justify a recovery, to the extent of injury sustained." One who has a bond of conveyance of a ship, from the builders, on payment of the balance of the cost, and who has the sole use of her, may insure freight in her, and may represent himself as the sole owner to the underwriters.³ One who holds goods under contract of purchase has an insurable interest to the amount already paid by him.⁴ One in possession of land under a contract of purchase, having made a part payment, has an insurable interest.⁵ And more broadly, a person in possession of land, as owner, under a valid and subsisting contract for the purchase, has an insurable interest therein.⁶ And further, one in possession of lands under a contract to purchase may describe them as his, in a policy; and this is not affected by the fact that he was at the time in default through the breach of a condition, if the vendor had not taken advantage of the same and declared the contract forfeited.⁷ Even after an agreement to rescind the contract of purchase, the insurable interest remains until the rescission is consummated.⁸ One in possession under a *bona fide* claim of title is not affected as to insurance by a defect in the

¹ *Milligan v. Equitable Ins. Co.*, 16 U. C. (Q. B.) 314. See also *Sherboneau v. Beaver Mut. Ins. Ass.*, 30 id. 472; *ante*, § 83 a.

² [*Ayres v. Hartford Ins. Co.*, 17 Iowa, 176, 181.]

³ [*Sinmes v. Marine Ins. Co.*, 2 Cranch C. C. 618, 620.]

⁴ [*Michael v. St. Louis Mut. Fire Ins. Co.*, 17 Mo. App. 23.]

⁵ [*Grange Mill Co. v. Western Ass. Co.*, 118 Ill. 396; *Ætna Ins. Co. v. Tyler*, 16 Wend. 385, 396.]

⁶ [*Tuckerman v. Home Ins. Co.*, 9 R. I. 414, 417; *Ramsey v. Phoenix Ins. Co.*, 2 Fed. Rep. 429; 17 Blatch. 527, 2d Cir. (N. Y.) 1880.]

⁷ [*Pelton v. Westchester Fire Ins. Co.*, 77 N. Y. 605, 608.]

⁸ [*MacCutcheon v. Ingraham*, 19 Ins. L. J. 32 (W. Va.), 1889.]

title.¹ When the assured got his title to the property insured by a fraud as to the consideration of the deed, it was held that he nevertheless had an insurable interest, as the conveyance to him was not void but only voidable.² Where the assured produced a deed conveying to him "a certain mill site and all the buildings thereunto belonging," it was held that the insurer could not show that the grantors of the assured had only a right of easement in the property.³ One in possession under claim of right, no adverse interest having been asserted, is the owner. But where the insured holds only under a parol agreement of a married woman to convey, which, by the law of the State is invalid, he has no insurable interest.⁴ One not in possession, claiming by conveyances to and by a fictitious person, has no insurable interest. Such a deed is not sufficient to raise a presumption of possession.⁵

§ 88. **Purchase at Auction before Payment; Fraudulent Conveyance.** — And it has been held in Tennessee that this interest exists under the following state of facts: The plaintiff had purchased the property at a sale on execution. He had neither paid the purchase-money nor any part thereof, nor had he received or been tendered a deed. Some arrangement was made with the creditors for time, and there was some understanding with the execution debtor that he was to hold the property as security for the amount bid, and other debts for which the plaintiff was liable to him. After the loss, the plaintiff being still delinquent in the payment of the purchase-money, the property was re-sold to another person.⁶ So both the vendor and vendee, under a conveyance which is fraudulent as against creditors, have insurable interests.⁷

¹ [Travis v. Continental Ins. Co., 32 Mo. App. 198.]

² [Phoenix Ins. Co. v. Mitchell, 67 Ill. 43, 45.]

³ [Miller v. Alliance Ins. Co., 19 Blatch. (U. S.) 308, 311.]

⁴ [Perry v. Mechanics' Mut. Ins. Co., 11 Fed. Rep. 478; 11 Ins. L. J. 409, 1st Cir. (R. I.) 1882.]

⁵ [David v. Williamsburgh City Fire Ins. Co., 7 Abb. N. C. 47.]

⁶ [Etna Ins. Co. v. Miers, 5 Sneed (Tenn.), 139.]

⁷ [Lerow v. Wilmarth, 9 Allen (Mass.), 382; Pettigrew v. Grand River, &c., 28 U. C. (C. P.) 70.]

§ 89. **Intruder.** — It has been held, however, that when a person is a mere intruder, and has no license or permission to occupy land belonging to another, he can have no insurable interest in buildings which he may erect thereon. Thus, certain parties jointly agreed to build a hotel on the beach on land belonging to the State, without lease or other permission. The plaintiff, one of the corporation, contracted with the rest to build the house, and by virtue of the contract became a creditor of the company. After it was built, several of the joint proprietors being unable to pay, their interest was transferred to the plaintiff, who thenceforth for two or three years used and occupied the premises, and at length procured insurance thereon. But the court said they had no rights individually or collectively; they were mere intruders, and had no interest which the law could in any way recognize.¹

§ 90. **Stockholder in Corporate Property.** — *Philips v. Knox County Mutual Insurance Company*² has been regarded as an authority that the stockholder of an incorporated company has no insurable interest, though he own all the stock of the company; though the real question in this case seems to have been whether the stockholder truly represented the title when he stated that the property was his, the insurers by their charter being entitled to a lien, and whether the insured was the owner in fee, in which case only the insurance was to be binding.^(a) But in *Warren v. Davenport Fire Insurance Company*,³ the point was distinctly made, and decided in the affirmative.⁴ Upon full consideration the court

¹ *Sweeny v. Franklin Ins. Co.*, 20 Pa. St. 337.

² 20 Ohio, 174, 178.

³ 31 Iowa, 464.

⁴ [A stockholder in a private company has an insurable interest in the corporate property. *Seaman v. Enterprise, &c. Co.*, 18 Fed. Rep. 250, 8th Cir. (Mo.)

(a) In New York a stockholder in a corporation is held to have an insurable interest in the corporate property. *Riggs v. Commercial Mut. Ins. Co.*, 125 N. Y. 7. When the property insured belongs to a corporation, but the loss is made payable to a third person, who is a

creditor and stockholder of the insured company, "as his interest may appear," this clause refers, not to the appointee's interest in the property, but to his interest as such creditor and stockholder. *Donaldson v. Ins. Co.*, 95 Tenn. 280.

held that a stockholder is clearly interested in the preservation of the property which gives value to his stock, and out of which come the dividends, and that the interest is of such a nature as to be insurable. The court refer to the Ohio case just cited, and, after pointing out the fact that the case turned upon the provision of the charter making the policy void if the true title be not stated, well observe that a mortgagee who had represented the property as his own would have failed in the same case, and for the same reason.

§ 91. **Administratrix.** — An administratrix was held to have an insurable interest under the following state of facts: The husband before his death agreed with the defendants for a policy upon his building and machinery. Before, however, the policy was issued he died, and the policy was afterwards issued insuring his "estate." In a suit brought on the policy assigned after the loss, and brought by the assignee, it was contended, on the part of the defendants, that the "estate" of the husband meant his administratrix, and that she as such administratrix had no interest in the realty. But the court said it was apparent that both parties intended that the building as well as the machinery should be insured, for so expressly said the policy; and as the heirs had the chief interest in the real estate, it might fairly be presumed, without the aid of extraneous evidence, that such insurance was effected for their benefit. If, however, this were doubtful, extraneous evidence might be adduced to ascertain in all cases of ambiguity in this respect what interests were intended to be insured.¹ So a widow who is in possession of her deceased husband's house built on land of which he was tenant for years, and had paid the ground rent, has an insurable interest both as presumptive owner of the house and as administratrix *de son tort*.²

§ 92. **Insolvent.** — Insolvent debtors and bankrupts may

1883. A shareholder in the Atlantic Telegraph Co., whose shares were dependent upon the success of the cable to England, had an insurable interest in the venture. *Wilson v. Janes*, 2 L. R. Exch. Div. 139, 148.]

¹ *Clinton v. Hope Ins. Co.*, 51 Barb. (N. Y.) 647; s. c. affirmed, 45 N. Y. 544. See also *post*, § 445.

² *Lingley v. Queen's Ins. Co.*, 1 Hannay (N. B.), 280.

also have an insurable interest. Thus, an insolvent, having obtained his discharge, acquired property and insured it. Subsequently, and after the loss, the creditors discover that the discharge was obtained by fraud, and upon proper proceedings had in court the discharge was revoked. Under the English insolvent law all the property which the insolvent has at the time of filing his petition, and all which he shall acquire before he becomes entitled to his discharge, vests in his assignee.¹ It was contended that as the order for the insolvent's discharge had been annulled, he was in the same position as if the discharge had never been granted, and consequently the assignee was entitled to the property in question, and might compel the insurance company to pay the loss to him. A party who insures, it was contended, must have a real and tangible, and not a merely speculative, interest in the property insured. But by Pollock, C. B.: "It is enough if he is responsible to some person for the property. There are many cases on marine policies which show that if a person can be called upon to account for property he has an insurable interest in it." And per Alderson, B.: "The insolvent having possession of the property is responsible for it to his assignee. Then why may he not insure it?" After advisement, it was held that, as the insolvent was in possession as the apparent owner, responsible to those who were the real owners, he might insure.² And the insurable interest remains even though the insolvent has concealed his goods from his creditors.³

§ 93. **Lien.** — Where by statute the mechanic has a lien for labor and materials furnished in the erection of a building, he has an insurable interest in the building.⁴ The lien attaches from the commencement of the labor and the furnishing the materials. Nor is it necessary that the validity of the lien should have in any way been brought to judicial cognizance. Before judgment, and even before filing the

¹ 1 & 2 Vict. c. 110, § 37.

² *Marks v. Hamilton*, 7 Wels. Hurl. & Gor. (Exch.) 323.

³ *Goulstone v. Royal Ins. Co.*, 1 F. & F. (N. P.) 276.

⁴ [*Insurance Co. v. Stinson*, 103 U. S. 25.]

claim, if the period within which the claim must be filed has not transpired, the interest subsists.¹ And it has been intimated that a *contractor* would have an insurable interest in the house he was engaged in building, irrespective of his statutory lien, if his compensation in any way depended upon the completion of the house; or, in other words, if by contract or custom he was not to be paid till the house was finished.² So the lien given for money advanced for repairs and supplies to a ship constitutes an insurable interest.³ But a general lien, like that of a judgment in some States, where by law it is a lien first upon the personal estate of the judgment debtor, and then upon his real indiscriminately, does not give an insurable interest in the whole or any part of the debtor's property to the judgment creditor, and in this respect is to be distinguished from a mortgage, which is a specific pledge of definite property, and gives the mortgagee an insurable interest.⁴

[§ 93 A. *A Lien or Interest in nature of a Lien is insurable.*⁵ — One having a lien on a vessel has an insurable interest in it.⁶ One having goods consigned to him as part security for a debt, has an insurable interest therein.⁷ An equitable lien for advances based on an agreement to put the property in my hands for sale, so that I may reimburse myself out of the proceeds, is an insurable interest, and though the vessel burns before it is finished and put in my possession, yet I can recover.⁸ Advances made in a foreign port to equip a vessel and procure for her a cargo are a lien, and constitute an insurable interest in the ship.⁹ One in possession of real

¹ Franklin Fire Ins. Co. v. Coates, 14 Md. 285; Carter v. Humboldt Fire Ins. Co., 12 Iowa, 287; Stout v. City Fire Ins. Co., id. 371; Longhurst v. Star Ins. Co., 19 id. 364.

² Protection Ins. Co. v. Hall, 15 B. Mon. (Ky.) 411.

³ Merchants' Mutual Ins. Co. v. Baring, 20 Wall. (U. S.) 159.

⁴ Grevenmeyer v. Southern Mut. Ins. Co., 62 Pa. St. (P. F. Smith, 12) 340. See *contra*, § 83, note.

⁵ [Hancox v. Fishing Ins. Co., 3 Sum. (U. S.) 132, 139.]

⁶ [Marine Ins. Co. v. Winsmore, 124 Pa. St. 61.]

⁷ [Wells v. Phila. Ins. Co., 9 S. & R. 103, 108.]

⁸ [Clarke v. Scottish Imp. F. Ins. Co., 4 Can. Supr. Ct. R. 192.]

⁹ [Insurance Co. v. Baring, 20 Wall. 159, 162.]

estate under a power of attorney to sell it to cover advances made to the owner may insure it.^{1]}

§ 94. **Liability for Loss.** — In Maine, Massachusetts, and probably other States, railroads are by statute given an insurable interest in buildings and other property along the line of the road, for the loss of which by fire communicated from the engine they would be responsible.² The interest here is analogous to that of the common carrier, who is an insurer by the common law, or to that of an underwriter, who is an insurer by contract;³ and being a different interest from that of ownership, should be so insured.⁴ Such insurable interest has been held to exist in growing timber located at a distance of three hundred feet from the line of the road,⁵ or even half a mile distant, where the fire starting in the grass adjacent to the road extends continuously to the wood.⁶

[§ 94 A. — Neither legal nor equitable interest in property is necessary to support insurance upon it; "it is enough if the assured is so situated as to be liable to loss from its destruction."⁷ In this case the C. Company insured N. against loss of royalties on patents that might occur by the stoppage of the manufactories of E. & Co., who paid to N. royalties on certain goods made by them. If a diminution of the royalties was caused by fire damage to the factories, the C. Company was to pay the amount of such diminution to N. The facts of the case do not seem to warrant the principle announced by the court, that no legal or equitable interest is necessary to support insurance. *The insurance was not upon the factories but upon the royalties.* It was against loss of the royalties by a particular cause. A fire might greatly damage the factories, yet if it did not result

¹ [Brugger v. State Investment & Ins. Co., 7 Rep. 616; 5 Sawyer, 304.]

² Chapman v. Atlantic & St. Lawrence R. R. Co., 37 Me. 92; Hart v. Western R. R. Co., 13 Met. (Mass.) 99; Hooksett v. Concord R. R. Co., 33 N. H. 242.

³ Eastern R. R. Co. v. Relief Fire Ins. Co., 98 Mass. 420.

⁴ Monadnock R. R. Co. v. Manufacturers' Ins. Co., 113 Mass. 77.

⁵ Pratt v. Atlantic & St. Lawrence R. R. Co., 42 Me. 579.

⁶ Perley v. Eastern R. R. Co., 98 Mass. 414.

⁷ [Nat. Filtering Oil Co. v. Citizens' Ins. Co., 106 N. Y. 535.]

in diminishing the royalties the policy did not attach. One who owns half of a vessel and charters the other half, agreeing to pay for the whole if lost, may insure the whole as his property.¹ (a) A common carrier may insure goods in his possession to the extent of their fair value,² even though they are shipped on a third party's vessel; and the carriers and not the third party are the proper ones to insure; nor will the omission of the owner of the vessel vitiate the policy unless it affects the risk.³ An insurance "on goods" is sufficient to cover the interest of carriers in property under their charge.⁴ The master of a vessel to whom property on board is to be consigned, in the absence of proof that the owner of the property had not given authority to order insurance, has an insurable interest therein, and may recover in case of loss.⁵

§ 95. **Debtor in Property attached; Bailee; Surety.** — Where the goods of an assured were levied upon by the sheriff by virtue of an execution against him, and the sheriff took actual possession of the goods, and left them in the store of the assured, the doors of which he fastened and the windows of which he nailed up, and the sheriff went out of town and took the key of the store with him, and during his absence a fire took place, which destroyed the store with its contents, it was held that the insured was nevertheless entitled to recover.⁶ In this case it was urged by the counsel for the plaintiffs in error that the question was not one of an insurable interest, but of a change of interest and risk produced by extrinsic circumstances. But the court, per Kennedy, J., did not acquiesce in this view of the case. They held that the position that the assured could not recover on his

¹ [Oliver v. Greene, 3 Mass. 133, 137, 138.]

² [Savage v. Corn Exchange, &c. Ins. Co., 36 N. Y. 655, 658.]

³ [Chase v. Washington, &c. Ins. Co., 12 Barb. 595.]

⁴ [Crowley v. Cohen, 3 B. & Ad. 478, 488.]

⁵ [Buck v. Chesapeake Ins. Co., 1 Pet. 151, 163.]

⁶ The Franklin Fire Ins. Co. v. Findlay, 6 Whart. (Pa.) 483; Keith v. Globe Ins. Co., 52 Ill. 518.

(a) The charterer of a vessel may insure her. The Gulnare, 42 Fed. Rep. W. Va. 407. 861; Murdock v. Franklin Ins. Co., 33

policy for the loss of a diminished interest was untenable; nor did they admit that the interest in this case was a diminished interest; for the loss must fall upon the defendant in error, neither the sheriff nor the plaintiffs in the execution being in default, unless he could obtain remuneration from the insurers upon the policy; and he was still liable on the judgment obtained against him to pay the debt for which his goods were taken on execution. A bailee, who has given a bond to dissolve an attachment, and is under obligation to produce the property to respond to the judgment, has an insurable interest.¹ So has a creditor in a stock of goods he has sold to his debtor.² And so has one who is liable on a warehouse bond to pay a tax or duties on the property insured.³

[§ 95 A. **Bailee; Warehouseman; Consignees; Commission Merchants; Builder.** — A bailee, though without pecuniary interest or responsibility for safe keeping, may insure and sue in his own name “for account of whom it may concern,” and the insurance will inure to the owners who may adopt the bailee’s act even after loss.⁴ A wharfinger may insure the full value of goods in his charge without the owner’s knowledge, and recover the entire proceeds as a trust fund for the said owners.⁵ Warehousemen may insure, and recover the full value of goods stored with them, the policy covering goods that were “their own or held by them in trust,” &c.⁶ Consignees who also advance money on account of the cargo and charges have an insurable interest in the ship.⁷ A commission merchant has an insurable interest in grain deposited with him, although the contract with the depositor stipulates that it is at owner’s risk of fire.⁸ Where one operating a grain elevator had wheat stored with him

¹ *Fireman’s Ins. Co. v. Powell*, 13 B. Mon. (Ky.) 312.

² *Roos v. Merchants’ Mut. Ins. Co.*, 27 La. An. 409.

³ *Insurance Cos. v. Thompson*, 95 U. S. 547.

⁴ [*Fire Ins. Ass. v. Merchants’, &c. Trans. Co.*, 66 Md. 339.]

⁵ [*Waters v. Assurance Co.*, 5 E. & B. 870, 880.]

⁶ [*Pelzer, &c. Co. v. St. Paul F. & M. Ins. Co.*, 41 Fed. Rep. 271 (S. C.), 1890.]

⁷ [*Aldrich v. Equitable Safety Ins. Co.*, 1 W. & M. (U. S.) 272, 275.]

⁸ [*Baxter v. Hartford Fire Ins. Co.*, 12 Fed. Rep. 481; 11 Biss. 306; 16 Cent. L. J. 50; 14 Rep. 106, 1882.]

for which he gave a receipt, "fire at owner's risk," it was nevertheless held that he had an insurable interest therein. In this case the wheat belonged to him. He was not to re-deliver the identical wheat deposited, but an equal quantity.¹ (a) A builder constructing a house on contract, and receiving the price in instalments, has the property in the house until it is delivered, or at least until it is ready for delivery and is approved, and he may insure the building.² (b)]

§ 96. **Vendee without Title; Shifting Interest.** — It has been said that an interest in goods under a contract which cannot be enforced as being in contravention of the Statute of Frauds, is not an insurable interest. Thus, where by verbal agreement the plaintiff had agreed to purchase oil to arrive, and to be paid for it if it arrived, but not otherwise, and it was lost, it appearing that the contract was one which by the Statute of Frauds is required to be in writing it was held that he had no insurable interest.³ And so where the plain-

¹ [Baxter v. Hartford Fire Ins. Co., 11 Biss. 306, 308.]

² [Commercial Fire Ins. Co. v. Cap. City Ins. Co., 81 Ala. 320.]

³ Stockdale v. Dunlop, 6 Mees. & Wels. 224.

(a) Such a bailee as a cotton-compress company may insure all the cotton placed in its hands for compression by different owners, as being held in trust; and it can recover the entire value in case of loss, holding the excess over its own interest for the benefit of those who have entrusted the goods to it. *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 409; *Merchants' Cotton-compress Co. v. Ins. Co. of North America*, 151 U. S. 368. See *Berry v. American Central Ins. Co.*, 132 N. Y. 49, 56.

(b) A house-mover has an insurable interest in the house to the extent of his compensation and expenses; but insurance thereof does not include his tools destroyed in the house. *Planters & Merchants' Ins. Co. v. Thurston*, 93 Ala. 255. The owner in fee of an unfinished building has an insurable interest therein while it is in process

of construction by a contractor, even though he has as yet supplied no money therefor, and is fully indemnified against loss through his contracts. *Foley v. Manufacturers' F. Ins. Co.*, 152 N. Y. 131; 43 L. R. Ann. 664, and note. Such owner and the contractor may each insure and recover for, independently of the other, the full amount of his interest. *Santa Clara Female Academy v. Northwestern National Ins. Co.*, 98 Wis. 257.

Insurance upon a decedent's "estate" by only one of the heirs, the administrator not assenting, is valid as to the insured's interest. *Phoenix Ins. Co. v. Hancock*, 123 Cal. 222; see *Krause v. Equitable L. Ass. Society*, 105 Mich. 329. A creditor of such estate has an insurable interest in the realty when the personal estate is insufficient to pay the debts. *Creed v. Sun Fire Office*, 101 Ala. 522.

tiff held an instrument made by the captain of a vessel, in the nature of a mortgage, to secure the plaintiff for money loaned with which to pay for repairs on the vessel, as the instrument was one which the captain of the vessel had no right to make, and was therefore void, the court said it did not give to the plaintiff an insurable interest.¹ Upon the doctrine of these cases it has been stated, as a general proposition, that a right under a contract not enforceable at law or equity will not support a policy of insurance; and among such contracts would be included a verbal contract for the purchase of real estate, when it is not aided by part performance.² (a)

§ 97. **Vendor in Possession, but without Title.** — In *North British and Mercantile Insurance Company v. Moffatt*,³ goods on a wharf were insured as “the assured’s own, in trust or on commission, for which the assured was responsible.” The assured had sold a portion of the goods destroyed and received the pay therefor, but still held the wharfinger’s delivery-warrant for the goods on behalf of the purchaser, though merely for the convenience of paying the charges necessary to clear the goods; and it was held that the goods had passed to the purchaser, so that the vendor, the assured, had no longer, at the time of the fire, any interest in the goods, or any responsibility therefor.

¹ *Stainbank v. Fenning*, 6 Eng. L. & Eq. 412.

² *Angell, Ins.* § 69. The learned author cites *Tidswell v. Ankerstein*, Peake, 151, and *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 419, neither of which seems to give the least support to the doctrine, or even to discuss the point in any way. The former merely decides that an executor has an insurable interest in the life of one who has granted an annuity to his testator, and the latter that a person having a house on the land of another, for which he pays rent under a verbal agreement, is not guilty of concealment in not stating this fact as to his title, not being interrogated thereupon. There is doubtless some mistake in the citation. And see *ante*, §§ 89, 90. It is doubtful if either of the cases cited in this section would now be regarded as law in this country. See *post*, § 108, and *ante*, § 87.

³ 41 L. J. N. S. C. P. 1.

(a) A vendee has an insurable interest in personal property, although the title remains in the vendor until delivery. *Wainer v. Milford Ins. Co.*,

153 Mass. 335, 341; *Amsinck v. American Ins. Co.*, 129 id. 185; *Bohn Manuf. Co. v. Sawyer*, 169 id. 477.

Holder of Promissory Note. — The holder of a note may insure its prompt payment, and the assignee of the policy, that being negotiable, has an insurable interest.¹ And so a surety for the fidelity of an employé may insure against his default.²

§ 98. **Reinsurance.** — The risk which one insurer has assumed with reference to any subject-matter of insurance constitutes an insurable interest, which the insurer may protect, to the extent of his liability, by effecting an insurance in his own favor against the risk he has assumed. This procuring insurance to cover a risk already assumed is called reinsurance. The subject-matter of the insurance in each case is the same, but the interests are different. In the first case, the owner's interest is that which is protected; in the latter, it is the insurer's interest in the preservation of the property by reason of the fact that he is under obligation to pay for it in case of loss. As the practice came to be a mode of speculating in the rise and fall of premiums, and there was danger that it might become a cover for wager policies, it was prohibited in England by statute³ except in certain cases.⁴ But it is a contract entirely within the general purposes and objects of insurance, and comes within the scope of the powers usually conferred by charters, and has, it is believed, been very generally, if not universally, England alone excepted, upheld.⁵

§ 99. **Copartner.** — A partner has an insurable interest to the amount of the value of the entire stock;⁶ and in a house purchased with partnership funds, but standing upon land of the other partner by his consent.⁷ Upon settlement of the joint account, the building must be treated as joint

¹ *Ellicott v. United States Ins. Co.*, 8 Gill & Johns. (Md.) 166.

² *Towle v. National Guardian Ins. Co.*, 5 L. T. R. N. s. 193; s. c. 30 L. J. Ch. 900; 7 Jur. N. s. 1109. See *post*, chapter on Guarantee Insurance.

³ 19 Geo. II. c. 27.

⁴ 1 Arnould, Ins. 287.

⁵ *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. (N. Y.) 359; *Eastern Railroad Co. v. Relief Fire Ins. Co.*, 98 Mass. 425. See also *ante*, §§ 9-12.

⁶ *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227.

⁷ *Converse v. Citizens' Mut. Ins. Co.*, 10 Cush. (Mass.) 37.

property, and his equitable interest in its preservation is an insurable one.¹ (a) When a partner retires from the firm, but no notice of a dissolution is given, and the firm name is used by the remaining partner, the retired but nominal partner has an insurable interest, so that insurance in the name of the firm is valid to the full amount. The legal interest is in the firm, though the beneficial interest is in the remaining partner.²

§ 100. **Duration of Interest.** — In general, it is essential that the insured shall be possessed of an interest, both at the time when the insurance is effected and at the time of the loss;³ and so strictly is this principle adhered to, that no recovery can be had even where by the terms of the policy the loss is payable to a third person, though that third person have at the time of the loss an interest in the property insured.⁴ This doctrine was early applied to life as well as to marine and fire policies;⁵ but we shall see hereafter that, as to life policies, it has undergone some modification; and in marine insurance the policy is often made to attach to after-acquired property.⁶ There seems to be no sufficient reason why the same principle should not apply in fire policies. Indeed, it has been frequently held that a policy on a stock of goods covers after-acquired and substituted goods.⁷ And a joint policy on the lives of a husband and wife, payable to the survivor, is not avoided by the cessation of interest after a divorce and a decree of alimony to the wife.⁸

¹ Ibid. See also *Oakman v. Dorchester Mut. Fire Ins. Co.*, 98 Mass. 57.

² *Phoenix Ins. Co. v. Hamilton*, 14 Wall. (U. S.) 504.

³ *Lynch v. Dalzell*, 4 Bro. P. C. 431; *Sadlers' Co. v. Badcock*, 2 Atk. 554; s. c. 1 Wil. 10; *Howard v. Albany Ins. Co.*, 3 Denio (N. Y.), 301; *Fowler v. Indemnity Ins. Co.*, 26 N. Y. 422; *French v. Hope Ins. Co.*, 16 Pick. (Mass.) 397.

⁴ *Tallman v. Atlantic Fire & Mar. Ins. Co.*, 29 How. (N. Y. Pr.) 71.

⁵ *Godsall v. Boldero*, 9 East, 72.

⁶ *Hooper v. Robinson* (Sup. Ct. U. S.), 8 Ins. L. J. 497; 1 Arnould, Ins. (Perk. ed.) 238.

⁷ *Butler v. Standard Ins. Co.*, 4 U. C. (App.) 391. See also *post*, § 101.

⁸ *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457.

(a) If property is insured under the name of the general partner, whose name is used to represent a special partnership formed under the Massachusetts statute, he can recover the full amount of the loss and not merely of his interest. *Clement v. British American Ass. Co.*, 141 Mass. 298.

[§ 100 A. The general rule undoubtedly is that the insured must have an insurable interest both at the time of insurance and at the time of loss.¹ But there are many exceptions.² An interest either at the time of loss or of insurance may be sufficient, and I do not think that the *reasons* of the exceptions are entirely confined to life insurance. Where the interest is known to be of such a nature that in the natural course of affairs and without fault of the assured it may cease before the event insured against transpires, it is very proper to hold the company, after cessation of the interest, to save the assured the loss of his premiums. But the insured should never be allowed to retain more than indemnity, otherwise he would have an interest in the destruction of the subject insured, and the evil at the heart of wager policies would creep in by a back door. Any funds recovered from the company beyond indemnity should go to the owner of the subject-matter or his representatives. This doctrine, however, is not uniformly recognized.³ Pennsylvania holds that if there is an insurable interest at the time of insurance, its cessation before loss will not deprive the assured of the right to the funds as against the representatives of the life.⁴ The grantee of an annuity who has insured the life of the grantor, is not bound to deliver up the policy of assurance to the grantor on the redemption of the annuity. In the absence of agreement or special circumstances, the policy belongs to the grantee of the annuity.⁵ A nephew insuring the life of an aunt who owed him money may recover, although the debt was paid before his aunt died. The view that a life policy is a contract of indemnity has been abandoned (as between the company and the assured). It is enough if the insured *had* an interest at the inception of the contract, and this without regard to the amount of it, unless the estimate was in bad faith.⁶ If

¹ [Chrisman v. State Ins. Co., 16 Or. 288.]

² [See § 115.]

³ [See ch. 24.]

⁴ [Appl. of Corson, 113 Pa. St. 438; Scott v. Dickson, 108 Pa. St. 6.]

⁵ [Gotlieb v. Cranch, 4 De G. M. & G. 440.]

⁶ [Corson v. Garnier, 17 Phil. 341; affirmed, 113 Pa. St. 438, 1880; citing

the declaration aver that the assured was interested at the time of loss, it need not aver that he was at the time of insurance.¹ The court thought there was much reason to believe that one having an interest at the time of loss, though none at the time of insurance, ought to be protected even without an express stipulation to that effect, and certainly if such was the agreement. On the contrary, it has been held in Canada that if the assured had no interest in the property at the time of insurance, a subsequently acquired interest will not save the policy, and a renewal, after the interest is gained, being a mere continuation of the void policy, is itself void.² This case puts technicalities before substance. Where there is no interest at the time of insurance, one of the necessary elements of the contract does not exist; but if afterwards and before loss the insured acquires an interest in the subject insured, whether it be life or property, that element comes into being, *and if, knowing the facts, the company thereafter* recognizes the policy as valid or executes a renewal, there could be no clearer case of a meeting of minds with all necessary elements existent, and the company should be held. In this case indeed, there is an interest at the time of contract as well as at the time of loss. The opinion goes on the ground that the renewal is a mere continuation of the old policy and not a new contract, but this is not the best view.³ The renewal is a new contract, and if at the time it is made the elements of a contract exist, it is sufficient. If, however, the original contract was defective, suit should be brought on the renewal receipt, not on the old policy.⁴

§ 101. **Continuity of Interest.** — It has also been said that the interest should remain an uninterrupted interest from the time of the insurance to the time of the loss, so that if the insured, at any time after the policy is taken out, parts

Phoenix Mut. Life Ins. Co. v. Baily, 13 Wall. 616; Conn. Mut. Life Ins. Co. v. Luchs, 108 U. S. 498.]

¹ [Henshaw v. Mut. Safety Ins. Co., 2 Blatch. 99, 104.]

² [Howard v. Lancashire Ins. Co., 11 Can. Supr. Ct. 92.]

³ [Firemen's Ins. Co. v. Floss & Co., 67 Md. 404.]

⁴ [See King v. Hekla Fire Ins. Co., 58 Wis. 508.]

with his title, though afterwards, and before the loss, he repurchase, yet the policy will not attach, and the insured will be without remedy.¹ But in the absence of any condition against alienation which avoids the policy, it is not easy to see how the insurers can be prejudiced by such an interruption of title, since for so long a period at least as is occupied by the interruption they are without risk, and at no time do they incur any greater hazard than they agree to assume, whether we regard the property upon which the risk is taken, or the person in behalf of whom it is taken. The insured has violated no stipulation of the contract, the insurer has not been prejudiced, and that there is nothing incompatible with the true principles of insurance in holding the insurer responsible after such an interruption, is shown by the familiar practice of insuring stocks in trade, under which the right of the insured to sell and repurchase the same stock, or a substitute, cannot be questioned.² In *Rex v. Insurance Companies*,³ it was held that, where a mortgagee insured his interest, which was based upon present and contemplated advances, to the mortgagor, and during the currency of the policy the earlier advances were repaid and new ones made, the policy was a valid security for such advances, within the amount insured, as remained unpaid at the time of the loss.⁴ And quite recently, in a case in Massachusetts, the case of *Cockerill v. Cincinnati Insurance Company* was cited in argument, and its doctrine insisted upon as the law. The facts were not such as to require a direct ruling on the point, but if they had been, there can be no doubt that the court would have sustained the validity of the policy.⁵

¹ *Cockerill v. Cincinnati Ins. Co.*, 16 Ohio, 148.

² *Lane v. Maine Mut. Fire Ins. Co.*, 3 Fairf. (Me.) 44; *Wood v. Rutland & Addison Mut. Fire Ins. Co.*, 31 Vt. (2 Shaw) 552; *Lee & Howard Ins. Co.*, 11 Cush. (Mass.) 324; *City Fire Ins. Co. v. Mark*, 45 Ill. 482; *Peoria Mar. & Fire Ins. Co. v. Anapow*, 51 Ill. 283; *Whitwell v. Putnam Fire Ins. Co.*, 6 Lans. (N. Y.) 166; *Mills v. Farmers' Ins. Co.*, 37 Iowa, 400, 404; *Crozier v. Phoenix Ins. Co.*, 2 Hannay (N. B.), 200; *ante*, § 100; *post*, §§ 374, 381.

³ 2 Phila. (Pa.) 357.

⁴ See also 2 Am. Leading Cases, 463.

⁵ *Worthington v. Bearse*, 12 Allen (Mass.), 382. The observations of the court

So a violation of the conditions against over-insurance or sale, and upon principle any like condition, non-existent at

in the case are so pertinent, and withal so weighty, that we make no apology for giving them in full. "But if it were otherwise," says Bigelow, C. J., who gave the opinion, "and it appeared that the sale of the vessel was complete and absolute, so that for a time the insured had parted with his insurable interest, his right to recover on the policy was not gone forever. It was only suspended during the time that the title to the vessel was vested in the vendee, and was revived again on the reconveyance to the insured during the term specified in the policy. The insurance was for one year. There was no stipulation or condition in the policy that the insured should not convey or assign his interest in the vessel during this period. The contract of insurance was absolute to insure the interest of a person named in a particular subject for a specified time; for this entire risk an adequate premium was paid, and the policy duly attached, because the assured at the inception of the risk had an insurable interest in the policy. So, too, at the time of the loss, all the facts necessary to establish a valid claim under the policy existed. The execution of the policy, the interest of the assured in the vessel, the due inception of the risk, a compliance with all warranties expressed and implied, and the loss by a peril insured against, are all either admitted or proved. Upon what legal ground, then, can it be maintained that the policy has become extinct? No fact is shown from which any inference can be made that by the alienation of the title to the vessel during the time named in the policy the risk of the insurers upon the subsequent retransfer of the vessel to the assured was in any degree increased or affected, or that any loss, injury, or prejudice to the underwriter was occasioned by the fact that the absolute title to the vessel was temporarily vested in a third person. On the contrary, such temporary transfer of title would seem rather to have inured to the benefit of the insurers, because they have received a premium for a risk from which they were exempted during a portion of the time designated in the policy. In the absence of any express stipulation, as in the policy declared on, no return premium could be claimed by the assured by reason of any temporary suspension of the work or withdrawal of the subject insured. The policy had attached, and the risk was entire. During the time that the vessel was owned by a person other than the assured, no loss could happen which could be covered by the policy. The insured, having no interest, could sustain no loss. If a total loss occurred during the period, the insurable interest would become extinct. Upon a retransfer of title to the insured, the policy would revive only to secure the renewed interest thereby acquired, and not to render the insurers liable for losses which may have happened during the intermediate period. The sole effect would be to suspend the risk for the time during which, by reason of the transfer, the assured had no interest in the subject insured, and to revive it as soon as the original interest was vested in him. The transfer of the vessel rendered the policy inoperative and not void. It could have no effect while the insured had no interest in the subject insured. But when this interest was revived or restored during the time designated in the policy, without any increase or change of risk or other prejudice to the underwriter, there seems to be no valid reason for holding that the policy has become extinct. Inasmuch as neither the subject nor the person insured is changed, and the risk remains the same, the intermediate transfer is an immaterial fact which can in no way affect the claim under the policy.

"This doctrine is not only consistent with sound reason, but it is in accordance with the analogies of the law of marine insurance. Risks may be temporarily sus-

the time of the loss, does not work a forfeiture, but only a suspension of the insurance during the violation.¹ So navigation in excepted or non-permitted waters may suspend but does not terminate the policy, unless explicitly so provided.² So a policy suspended during repairs may revive after their completion.³

§ 102. *Life.* — Within the present century it was made a serious question in one of the most learned courts of this country, in a case of novel impression, whether one person can have such an interest in the preservation of the life of another as to make it the valid basis of a contract of insurance. But as upon well-settled principles of law all contracts, fairly made, upon a valuable consideration, which infringe no law, and are not repugnant to the general policy of the law, or to good morals, are valid and may be enforced, or damages recovered for the breach of them, it saw no reason to except the contract of insurance out of this general rule. Prior to this decision, the insurance of lives was prohibited in several of the countries of Europe, though it

pended, and subsequently revived, without invalidating the right of the assured to claim under the policy. Unseaworthiness, after the policy has attached, if imputable to the neglect or other fault of the assured, will suspend, but not destroy, the risk. Restoration of the navigability of the vessel will revive the right of the assured to claim under his policy. *Taylor v. Lowell*, 3 Mass. 331; 1 Phil. Ins. § 734. So goods insured for a voyage which, by the terms of the policy, are covered only when water-borne, may be withdrawn from the risk while temporarily placed on land; but the policy upon them will revive when, without increase of risk, they are again put on board the vessel. In these and like cases the principle adopted is, that the contract of insurance is not violated, or the right of the assured to claim an indemnity affected, by the existence of a state of facts which does not contravene any stipulation in the policy, or in any way change or affect the risk, or otherwise work any injury or prejudice to the rights of the insurer." The learned judge cites also *Carroll v. Boston Mar. Ins. Co.*, 8 Mass. 515; *Power v. Ocean Ins. Co.*, 19 La. 28; *Howard v. Albany Ins. Co.*, 3 Denio (N. Y.), 301; 1 Phil. Ins. § 89. And see also *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio, N. S. 452; and *Hooper v. Hudson River Ins. Co.*, 15 Barb. (N. Y.) 413; s. c. affirmed in Court of Appeals, 117 N. Y. 424.

¹ *New England Fire & Mar. Ins. Co. v. Schettler*, 38 Ill. 166; *Obermeyer v. Globe Mut. Ins. Co.*, 43 Mo. 573; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. St. 402; *Power v. Ocean Ins. Co.*, 19 La. 28; *Lane v. Maine Mut. Fire Ins. Co.*, 3 Fairf. (Me.) 44; *Morrison v. Tenn. Mar. & Fire Ins. Co.*, 18 Mo. 262. And see *post*, § 245.

² *Greenleaf v. St. Louis Ins. Co.*, 37 Mo. 25, 30. But see *contra*, *Wilkins v. Tobacco Mar. & Fire Ins. Co.*, 2 Superior Ct. (Cincinnati) 204.

³ *Insurance Co. of N. A. v. McDowell*, 50 Ill. 120.

does not appear that the prohibition rested so much upon the absence of an interest to be protected, as upon some vague notion that it is indecorous to attempt to set a price upon the life of a man.¹

[§ 102 A. **What is an Insurable Interest in a Life.** — To have an insurable interest in the life of another one must be a creditor or surety, or be so related by ties of blood or marriage as to have reasonable anticipation of advantage from his life.² Whenever there is such a relationship that the insurer has a legal claim on the insured for services or support, or when from the personal relations between them the former has a reasonable right to expect some pecuniary advantage from the continuance of the life of the other, or to fear loss from his death, an insurable interest exists.³ And again, "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage should be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child. . . . Natural affection in cases of this kind is considered more powerful in protecting the life of the insured than any other consideration."⁴]

§ 103. **Sister in Life of Brother in loco parentis.** — In *Lord v. Dall*, *supra*, the court not only found no difficulty in holding that one person may have an insurable interest in the life of another, but, in determining under what circumstances that interest may exist, laid down important prin-

¹ *Lord v. Dall*, 12 Mass. 115, decided in 1815.

² [*Appl. of Corson*, 113 Pa. St. 438 ; *Keystone Mut. Ben. Ass. v. Norris*, 115 Pa. St. 446 ; *United Brethren Mut. Aid Soc. v. McDonald*, 122 Pa. St. 324, (stepson and stepfather as such no insurable interest).]

³ [*Rombach v. Piedmont, &c. Life Ins. Co.*, 35 La. An. 233.]

⁴ [*Warnock v. Davis*, 104 U. S. 779.]

ciples which have since been generally approved, and led, and are leading, to a great enlargement of the catalogue of insurable interests. In that case the policy was effected by the plaintiff upon the life of her brother, who was about to embark on a voyage to South America, or elsewhere, from Boston. The insurance was for \$5,000 for seven months, and the premium paid was one per cent per month. The plaintiff was a young female, without property, and had been supported and educated at the expense of the brother, who stood towards her *in loco parentis*.¹ Nothing could show a stronger affection of a brother, said the court, for a sister, than that he should be willing to give a large sum to secure her against the contingency of his death, which would otherwise have left her in absolute want; and no one could hesitate to say that in the life of such a brother the sister had an interest. They were well satisfied that the interest of the plaintiff in that case, in the life of her brother, was of a nature to entitle her to insure it, observing, that the interest of a child in the life of a parent, except the insurable one, which may result from the legal obligation of the parent to save the child from becoming an object of charity,¹ is as precarious as that of a sister in the life of an affectionate brother. For if the brother may withdraw all support, so may the father, except as above stated. And yet a policy effected by a child upon the life of a father, who depended upon some fund, terminable by his death, to support the child, would never be questioned, although much more should be secured than the legal interest which the child had in the protection of his father.

[§ 103 A. Daughter; Granddaughter; Nephew; Son-in-law. — A daughter cannot insure the life of her mother unless she has a pecuniary interest in it.² (a) A granddaughter has

¹ The observation of Bayley, J., in *Halford v. Kymer*, that it was a matter of indifference to the father whether he was supported by the son or by the parish, entirely overlooked the ground of expectation arising out of affection and filial duty.

² [Continental Life Ins. Co. v. Volger, 89 Ind. 572.]

(a) One who is by statute made son and mother under the statutes of liable for the support of another, as Illinois, has not an insurable interest

not, as such, any insurable interest in the life of her grandfather.¹ (a) A nephew has not, as such, an insurable interest in the life of an aunt.² (b) A son-in-law has no insurable interest in the life of his mother-in-law,³ (c) and her executor can recover the funds from the son's assignee.⁴

§ 104. **Father in Life of Son.** — As to what constitutes an insurable interest under a life policy, we may observe, as has heretofore been observed with reference to fire insurances, that the tendency of the courts has been from strictness to liberality. It was early intimated, if not expressly held, that the interest must be a pecuniary interest, and therefore a father could not insure the life of his son. The value of the interest in such a case, said the court, is not a farthing.⁵ The case was that of a minor son, upon whose arrival at his majority depended the vesting of a large sum of money under a settlement. The insurance was for two years, the minor being nineteen and a few months at the time the insurance was effected, and the object was to guard against the failure of the settlement to vest, in case of the death of the minor before his majority. As the money was to go to the son if he lived, doubtless the father had no direct pecuniary interest in that. The plaintiff pressed the point, however, on the ground that he had an interest in the

¹ [Burton v. Conn. Mut. Life Ins. Co., 18 Ins. L. J. 713; 19 Ins. L. J. 75 (Ind.), May, 1889.]

² [Appl. of Corson, 113 Pa. St. 438.]

³ [Rombach v. Piedmont, &c. Life Ins. Co., 35 La. An. 233.]

⁴ [Stambaugh v. Blake, 1 Monaghan (Pa.), 609. In this case a curious effort was made to prove that the son supported the mother-in-law, as though that gave him an interest in her life.]

⁵ Halford v. Kymer, 10 B. & C. 725.

in such other's life, in the absence of any right to services or maintenance. People's Mut. Benefit Society v. Templeton, 16 Ind. App. 126.

(a) Burton v. Conn. Mut. L. Ins. Co., 119 Ind. 207.

(b) Nor has an uncle in the life of his minor nephew whom he supports: Prudential Ins. Co. v. Jenkins, 15 Ind. App. 297; nor has a woman in the life

of her stepmother. Albert v. Mutual L. Ins. Co., 122 N. C. 92.

(c) Stambaugh v. Blake, 1 Monaghan (Pa.), 609. One may have an insurable interest in the life of a step-sister whom he has agreed to care for and help maintain. Barnes v. London, &c. Ass. Co., [1892] 1 Q. B. 864. That a parent now has an insurable interest in his child's life, was held in Wakeman v. Met'n L. Ins. Co., 30 Ontario, 705.

services of his son, and upon the further ground that in case of need the son would be bound to support him. The court seemed to rely upon *Innes v. The Equitable Assurance Company*, cited by Mr. Justice Bayley, as having been tried before Lord Kenyon,¹ where the plaintiff, in order to show an interest in the life of his daughter, offered a will by which he was to receive a certain sum of money contingent upon the life of his daughter. The will was proved to be a forgery, however, and apparently the defendants had a verdict on that ground. There was no discussion of the question whether an insurable interest existed on other grounds, but, as Lord Tenterden says, it was in effect admitted in that case that it was necessary to prove that the father had a pecuniary interest in the life of his daughter.

§ 105. But the law has been held differently in this country, and it has been determined that though a father, as such, may have no insurable interest, resulting merely from that relation, in the life of a child of full age, yet if that son is a minor of such age as to render valuable services, and to whom advances have been made, there can be no doubt of the father's insurable interest in his life. The father is entitled to the earnings of such child, and may maintain an action for their recovery. So he may maintain an action for the loss of his services if the child be injured. Hence he has a pecuniary interest which the law will protect and enforce.² Nor is it easy to see why, upon the principles laid down in *Lord v. Dall*, and stated in the plaintiff's argument in *Halford v. Kymer*,³ by reason of the relationship and its attendant rights and obligations, an aged father, no longer capable of self-support, and actually supported by his son who has passed his majority, and who both by natural affection and by law is bound to contribute to his support, has not an insurable interest in the life of that son. It is

¹ This case is not reported ; but it is referred to and stated most fully in 4 Lon. Law Mag. 373, where Lord Tenterden is reported to have said, at the argument in *Halford v. Kymer*, that they could not give judgment for the plaintiff without flying in the teeth of the case tried by Lord Kenyon.

² *Mitchell v. Union Life Ins. Co.*, 45 Me. 104.

³ 10 B. & C. 725.

precisely this natural affection, combined with the legal obligation to support, which by universal consent gives to the child an insurable interest in the life of the father. A son arrived at his majority may, in point of fact, have no need of his father's assistance, but the legal obligation of the parent to save the child from becoming an object of public charity gives to the child an insurable interest in the father. The same legal obligation of the child towards the father ought to give the father the like interest in the life of the child.

§ 106. And to this extent the following case in Massachusetts would seem to go, though it was not necessary so to decide upon the facts in the case, which were as follows:—

On the 2d day of February, 1849, the plaintiff's intestate insured for seven years the amount of \$700 on the life of a minor son who was about to proceed to California, and who would become of age on the 6th day of the following January. The wages of the son had been taken by the father and appropriated to the support of the family. It was agreed between the son and a third person who had advanced him money with which to prosecute the enterprise that that third person should receive one-half his net earnings. To this agreement the father assented; he also provided an outfit for the son. The son died on board ship on the 1st day of December, 1849, soon after his arrival in California. It was held that the father had an insurable interest at the time of such minor son's death.¹ And the same doctrine was more recently directly asserted in Pennsylvania.²

¹ "We understand," said the court, "that the law of Connecticut, where the parties resided, is similar to that of Massachusetts, and that by the law of both States a father who supports, maintains, and educates a son under twenty-one years of age, and not emancipated, is entitled to the earnings of such son, and may maintain an action for them. Here, where the father had in terms relinquished his right to a share in the son's earnings for a valuable stipulation on the other side, designed and intended to increase those earnings, by a necessary implication he reserved his right to the other share of those earnings. According to any, the strictest, rule of construction, the assured, we think, had a direct and pecuniary interest in the life of the *cestui que vie*, his son. It is argued that the

² Reserve Life Ins. Co. v. Kane, 81 Pa. St. 154. See also Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457.

§ 107. Still it may not be safe to advance from the cases just stated to the general propositions that a father may insure the life of any minor child, and that a sister may insure the life of any brother. In one case,¹ in reply to the

time which would remain after his probable arrival in California, before becoming of age, would be so short that his earnings, if anything, would be very small. Supposing he was to have a passage of three or five months, he might still have five or six months to work in California; and this being a contract dealing with chances and probabilities, and even possibilities, and to be construed as such, it may well be supposed that the parties had it in contemplation that by working a few weeks or days in a gold-mine, or by a lucky hit in a single day, he might gain gold enough to make his share exceed the whole sum insured. But nearness or remoteness of this chance is immaterial; the parties regulate this matter for themselves, in fixing the sum to be insured and the rate of premium. It seems to us, therefore, that, according to the rule relied on by the defendants, the assured in the present case had a direct and pecuniary interest in the life of the son, sufficient to enable him to maintain this action.

"But, upon broader and larger grounds, we are of opinion that, independently of the fact that the son was a minor, and the assured had a pecuniary interest in his earnings, the assured had an insurable interest sufficient to maintain this action.

"The case in this State must be governed by the rules and principles of the common law, there being no regulation of the subject by statute; and the statute of 14 Geo. III. c. 48, passed about the time of the commencement of the Revolution, never having been adopted in this State. All, therefore, which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is that the insured has some interest in the life of the *cestui que vie*; that his temporal affairs, his just hopes, and well-grounded expectations of support, of patronage, and advantage in life will be impaired; so that the real purpose is not a wager, but to secure such advantages, supposed to depend upon the life of another; such, we suppose, would be sufficient to prevent it from being regarded as a wager. Whatever may be the nature of such interest, and whatever the amount insured, it can work no injury to the insurers, because the premium is proportioned to the amount; and whether the insurance be to a large or small amount, the premium is computed to be a precise equivalent for the risk taken. Perhaps it would be difficult to lay down any general rule as to the nature and amount of interests which the assured must have. One thing may be taken as settled, — that every man has an interest in his own life to any amount at which he chooses to value it, and may insure it accordingly.

"We cannot doubt that a parent has an interest in the life of a child, and, *vice versa*, a child in the life of a parent; not merely on the ground of a provision of law that parents and grandparents, children and grandchildren, are bound to support their lineal kindred when they stand in need of relief, but upon considerations of strong morals and the force of natural affection between near kindred, operating often more efficaciously than those of positive law." Loomis, *Adm'r, v. Eagle Life & Health Ins. Co.*, 6 Gray (Mass.), 396, opinion per Shaw, C. J.; Hoyt *v. New York Life Ins. Co.*, 3 Bosw. (N. Y. Superior Ct.) 440; Miller *v. Eagle Life & Health Ins. Co.*, 2 E. D. Smith (N. Y. C. P.), 268; Williams *v. Wash. Life Ins. Co.*, 31 Iowa, 541.

¹ Mitchell *v. Union Life Ins. Co.*, 45 Me. 104.

objection that the policy was unsupported by any insurable interest, evidence was offered that the father had furnished supplies and money to his son who was about to proceed to California, and the fact of these advances seems to have been regarded by the court as a matter of significance. In another case,¹ substantially the same facts existed, with the additional fact that the father had usually received the earnings of his son, and had specially reserved a portion of them during the currency of the policy. Upon this latter fact the court laid considerable stress, and held only that in that case the plaintiff had an insurable interest. In the third case,² the court emphasize the fact that the sister had been supported and educated by the brother, and add, that no one would hesitate to say that in the life of such a brother the sister had an interest. And afterwards,³ in speaking of *Lord v. Dall*, the same court say that that case held that the insurable interest might be inferred from particular circumstances. So that it is by no means certain that were the circumstances different, — as, for instance, if the father were to insure for one year the life of an infant son, or if the son were to insure the life of a decrepit and pauper father, or a sister were to insure the life of a brother incapable or indisposed to assist her, there being in either case no well-founded expectation of pecuniary advantage from the continuance of the lives, or risk of loss from their termination, — the courts would see in such circumstances any interest which would support a policy. The relationship, therefore, seems to be of little importance, except as tending to give rise to the circumstances which justify the expectation. Indeed, the doctrine of the latest of the Massachusetts cases before cited is broad enough to cover a case where there is no relationship at all, save one perhaps of mere friendship, if the circumstances are such as to show that the loss of the insured life will probably result in pecuniary disadvantage to the person procuring the insur-

¹ *Loomis, Adm'r, v. Eagle Life & Health Ins. Co.*, 6 Gray (Mass.), 396.

² *Lord v. Dall*, 12 Mass. 115.

³ *Loomis, Adm'r, v. Eagle Life & Health Ins. Co.*, *ubi supra*.

ance. Upon the whole, however, it yet remains to be decided whether mere relationship, with its attendant rights and obligations, as between father and son reciprocally, is a sufficient foundation upon which to rest an insurable interest.

(s) The cases decided since the first edition of this work was published are not perhaps in entire accordance with each other. On the one hand, it has been distinctly held that mere relationship of father and son did not give the son an insurable interest, "where both parties are of mature years, and live apart, in independent pecuniary circumstances, and mutually entirely independent of each other, and having no business relations with each other."¹ So one brother has been held to have no insurable interest in the life of another on the mere ground of relationship.² Perhaps both cases may fairly be considered as deciding only that such a relationship does not give an insurable interest when the other facts and circumstances show that the policy was a mere speculation.³ The case of *Insurance Company v. Bailey*⁴ is not regarded by the Supreme Court of Illinois as going any further than this. In *Singleton v. St. Louis Mutual Life Insurance Company*,⁵ a nephew was held to have no insurable interest, by mere relationship, in the life of an uncle.

(t) On the other hand, mere relationship seems to have been held sufficient to support a policy on the life of a son in favor of the mother, in *Reif v. Union Mutual Life Insurance Company*;⁶ and on the life of a brother in favor of a sister.⁷ So it was held in *Kane v. Reserve Mutual Life Insurance Company*.⁸ A sister who is also a creditor has an

¹ *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35.

² *Lewis v. Phoenix Mut. Life Ins. Co.*, 39 Conn. 100.

³ See also *Cammack v. Lewis*, 15 Wall. (U. S.) 643.

⁴ 13 Wall. (U. S.) 616, 619.

⁵ 66 Mo. 63.

⁶ *Superior Court, Cincinnati*, at *Nisi Prius*, 17 *Ins. Chronicle*, p. 3.

⁷ *Etna Life Ins. Co. v. France*, 94 U. S. 561. See also *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457.

⁸ 9 Phila. 234. But see same case in *Supreme Court*, 81 Pa. St. 151, where it is said that the relationship prevents the policy from being a mere wager, as under the poor-laws the son may have to support the father.

insurable interest in the life of her brother beyond the debt.¹

§ 107 *a*. **Loss; Feme Sole under Contract of Marriage.** — In *Chisholm v. National Capital Life Insurance Company*, the plaintiff, who was the betrothed of one Clark, and for whom he had taken out a policy on his life, payable to her, was allowed to recover. The insurable interest at the inception of the contract was sufficient, if any were necessary, of which the court intimated a doubt, in the absence of evidence tending to show the contract was a wagering one, or against public policy. The plaintiff had an interest in the life of Clark, as a valid contract of marriage was subsisting between them. Had he lived and violated the contract, she would have had her action for damages; had he observed and kept the contract, then as his wife she would have been entitled to support.²

The question, what is such an interest in the life of another as will support a contract of insurance upon the life, is one to which a complete and satisfactory answer, resting upon sound principles, can hardly yet be said to have been given. As the premium is intended to be a precise equivalent for the risk taken, it would seem that the contract is a just and equitable one, whether any interest in the life exists or not; and that the only essential inquiry is, whether the object of the contract is such as to obviate the objections to a mere wager upon the chances of human life.³

§ 107 *b*. **Wife in Husband.** — Of course, and for similar reasons, the wife has an insurable interest in the life of her husband.⁴ And it has been held that a divorce obtained at the instance of the wife, for whose benefit the life of the husband has been insured, will not deprive the wife, who has children and supports them, of a right to recover. The

¹ *Goodwin v. Mass. Mut. Life Ins. Co.*, 73 N. Y. 480.

² 52 Mo. 213. But see this case commented upon and limited in *Singleton v. St. Louis Mut. Life Ins. Co.*, 66 Mo. 63.

³ *Forbes v. American Mut. Life Ins. Co.*, 15 Gray (Mass.), 249. Substantially the same observation was made in *Anderson v. Morice*, 25 W. R. 14, as to insurable interests generally.

⁴ *Baker v. Union Mut. Life Ins. Co.*, 43 N. Y. 283; *St. John v. American Mut. Life Ins. Co.*, 2 Duer (N. Y.), 419; *Gambis v. Covenant Life Ins. Co.*, 50 Mo. 44. See also *Reed v. Royal Ex. Ass. Co.*, *Peake's Ad. Cas.* 70.

insurable interest remains sufficient to support the policy. Although divorced, the children whom she is supporting may look to the father for support. That the care and custody of the children are decreed to her does not extinguish the obligation of the father to provide for them. And he also may be required by the court to contribute by way of alimony, or otherwise, to the support of his former wife.¹ And it seems that a woman living unlawfully with a man as his wife, and treated and supported by him as such, has an insurable interest in his life.²

[§ 107 C. **Husband in Wife's Life.** — The presumption is that a husband has an insurable interest in the life of his wife. He is entitled to her service and companionship. She *may* be a burden, as, if she is a hopeless maniac or invalid, and such facts when shown may require a different rule, but in the absence of such evidence the husband as such has an insurable interest.³ The objection that the plaintiff had no insurable interest comes with very bad grace from a company that has received two or three thousand dollars of the plaintiff's money on a policy issued with knowledge of the very facts which it objects to now as insufficient to create an insurable interest.⁴]

§ 108. **Creditor in Debtor.** — That a creditor has an insurable interest in the life of his debtor was adjudged in a very early case. The means by which the debt is to be satisfied may very materially depend upon the continuance of the life of the debtor, and at all events the death of the debtor must in all cases in some degree lessen the chances of payment.⁵ The point was made also in a very early case that, if the debtor was an infant who might interpose as against his creditor the plea of infancy, this contingency took the debt out of the category of insurable interests. But though the

¹ McKee v. Phoenix Ins. Co., 28 Mo. 383. See also *post*, § 391.

² Equitable Life Assurance Soc. v. Paterson, 41 Ga. 338. And see *post*, § 305.

³ [Currier v. Continental Life Ins. Co., 57 Vt. 496, 500.]

⁴ *Ibid*.

⁵ Anderson v. Edie, Park, Ins. 432. [A creditor has an insurable interest also in the life of his debtor. Amick v. Butler, 111 Ind. 578; Parks v. Conn. Ins. Co., 26 Mo. App. 511.]

point was not decided, it was strongly intimated that the debt, till avoided, must be taken as the debt of an adult, as against a third person, since the debtor only could take the objection.¹ The debt is not void, but only voidable, and if for necessities not even that.² Upon the same principles, if the debt be one to which the Statute of Limitations might be pleaded at the time of the death of the debtor, it nevertheless constitutes an interest which will support a policy. A debt still exists. It is not extinguished by the currency of the statute, as in the case of payment. It may be revived by a new promise, and indeed without such promise be enforced by action, unless the defence of the statute be interposed. The law does not presume that a new promise will be refused or the defence of the statute interposed.³ And there can be no doubt that the same would be the case, though the statute had run against the debt at the time of the insurance, and for the same reasons. So has an executor an insurable interest in the life of his testator's debtor.⁴

But though the law will allow a creditor to protect himself by insuring the life of the debtor, the insurance will not be supported, if it appears from the great disparity between the debt and the amount insured, or otherwise, that the transaction is rather one of speculation than of protection.⁵

[The creditor is only entitled to indemnity. If the debt and all premiums and expenses are paid to him, the insurance inures to the benefit of the debtor or his sureties.⁶

¹ Dwyer v. Edie, Park, Ins. 432. See also *ante*, § 80.

² Rivers, Adm'r, v. Gregg, 5 Rich. Eq. (S. C.) 274.

³ Rawls v. American Mut. Life Ins. Co., 27 N. Y. (13 Smith) 282, affirming s. c. 36 Barb. (N. Y.) 357. And see *post*, § 117, n.

⁴ Garner v. Moore, 3 Drewry, 277.

⁵ Fox v. Pennsylvania Mut. Life Ins. Co., Dist. Ct. of Phila. ; s. c. 4 Big. L. & A. Ins. Cas. 458. The verdict in the case for the plaintiff was set aside. [A creditor for \$300 who had paid about \$500 on abandoned policies on the life of his debtor, insured it again for \$3000 and received the whole amount, which the courts allowed him to hold against the representatives of the debtor, on the ground that the evidence did not show the insurance to be merely collateral, that the disproportion did not render the policy a wager, and that it was neither illegal nor immoral for the creditor to assure the sums he had fruitlessly paid on other policies on the same life, as well as the debt. Grant's Adm'r v. Kline, 115 Pa. St. 618.]

⁶ [See 100 A, 117, and ch. 24.]

When a debtor and a surety entered into a bond to secure payment by instalments of a debt, and the expenses of effecting a policy on the debtor's life as a collateral security, and when after a time the creditor was obliged to pay the premiums, as neither debtor nor surety would do so, it was held on the death of the debtor that it still accrued to the benefit of the surety on repayment of the amounts paid by the creditor.¹ But a creditor who, acting for himself and not under agreement with or as agent of the debtor, insures the life of his debtor, will not have his right to recover affected by a subsequent payment of the debt.² The premium as well as the debt must be paid to destroy his claim, and that cannot be done by the company. It has received payment for the risk and cannot escape it.

No only one who is a creditor, but one who has entered into an obligation which may make him a creditor on a certain contingency has an insurable interest. A surety on an official bond has an insurable interest in the life of the obligor.³

§ 109. **Modes of Insurance on Debtor's Life.** — The life of a debtor may be insured in two ways. The debtor may insure to an amount beyond the debt for the benefit of his creditor, and payable in case of loss to the creditor, in trust, first to pay the debt, and then to pay the balance to such parties as the debtor may designate;⁴ or the creditor may insure the life of his debtor to the amount of the debt, payable to himself in case of loss. And if a creditor without fraud, and in ignorance of the law, insures the life of his debtor for a larger amount than the debt, he may recover back the excess of premium.⁵ The creditor may also insure the life of one of two joint makers of a note, although the other be entirely able to pay the debt, and the estate of the insured be solvent; and he may recover the whole amount insured.⁶ And if the creditor be a firm and the debtor be a

¹ [Drysedale v. Pigot, 8 De G. M. & G. 546.]

² [Ferguson v. Mass. Mut. Life Ins. Co., 32 Hun, 306.]

³ [Scott v. Dickson, 108 Pa. St. 6.]

⁴ American Life & Health Ins. Co. v. Robertshaw, 26 Pa. (2 Casey) 189.

⁵ London, &c. Life Ins. Co. v. Lapierre, Q. B. (L. C.) 1878, 8 Ins. L. J. 79.

⁶ Morrell v. Trenton Mut. Life & Fire Ins. Co., 10 Cush. (Mass.) 282.

firm, each member of the creditor firm has an insurable interest in the life of each member of the debtor firm.¹

§ 109 a. **Partner in Copartners.** — A case of some novelty in its facts has been before the courts of New York, recognizing an insurable interest in services agreed to be rendered. Three persons entered into a copartnership, two of them putting in the cash capital, and the third, who understood the business, putting in his skill as against the capital of the other two. And it was held that the two putting in their capital had an insurable interest in the life of the other, as his death would deprive them of his skill and services contributed to the common stock in lieu of cash capital.² (a) [Where A. and B. went into partnership with a capital of \$10,000, and A. furnished B.'s half, A. was held to have an insurable interest in B.'s life to the extent of the moiety of the capital, without respect to the state of partnership accounts and profits, unless the estimate of his interest at the time of the application was made in bad faith.³]

§ 109 b. **Interest in Future Earnings of the Insured under a Contract.** — Somewhat analogous to the relation of debtor and creditor is that of a party who advances funds to another to enable him to prosecute an enterprise, under the agreement that the party so advancing the funds shall be entitled, in consideration therefor, to a portion of the profits

¹ *Rawls v. American Life Ins. Co.*, 36 Barb. (N. Y.) 347; s. c. 27 N. Y. (13 Smith) 282.

² *Valton v. National Loan Fund Life Assurance Soc.*, 22 Barb. (N. Y.) 9. The case subsequently went to the Court of Appeals (20 N. Y. 32), where the judgment of the court below was affirmed.

³ [*Conn. Mut. Life Ins. Co. v. Luchs*, 108 U. S. 498, 505, 508.]

(a) A partner has no necessary insurable interest in the life of his co-partner: *Powell v. Dewey*, 123 N. C. 103; or in the latter's household furniture. *Georgia Home Ins. Co. v. Hall*, 94 Ga. 630. A partnership's insurable interest in the life of one of its members, who is not indebted to it, is limited to such premiums on his policy as are paid out of the firm assets and interest thereon, his heirs or legal representatives being entitled to the residue. *Cheeves*

v. Anders, 87 Texas, 287. See *Powell v. Dewey*, 123 N. C. 103. Where a partner misappropriated money of the firm and applied it to the purchase of policies on his life for the benefit of his wife, the firm was held entitled, on the death of the partner, to recover the entire amount of insurance, it having been purchased exclusively with their money, and not merely the premiums paid. *Holmes v. Gilman*, 138 N. Y. 369.

of the enterprise accruing within a certain time. Here there is no debt, but only an obligation to pay over a portion of the profits earned within a certain period, if any shall be earned. This kind of contract was frequent in the early days of the Californian gold excitement, and it has been frequently held that such a contract gave the party furnishing the advance and outfit an insurable interest in the life of the person who was to prosecute the enterprise.¹ The amount of the insurable interest in such cases must be left to the determination of the parties. It does not depend at all upon the amount of advances and the cost of outfit. Of course the amount of earnings or profits which may be acquired in such cases is wholly conjectural, and whatever the amount agreed upon by the parties in good faith may be, this will be taken to be the value of the interest in case of loss, as upon a valued policy, which the plaintiff will be entitled to recover. There seems to be no limit to the amount which may be fixed as the value of the loss. If the party effecting the insurance, under the influence of exaggerated expectations, is desirous to fix the prospective profits at a large sum, and is willing to pay proportionably in the shape of premiums, there seems to be no reason why the insurers should not accept the obligation. It is the same thing to them, so far as the risk is concerned, whether they take a small risk or a large one, except that, if there is a profit on the small one, there will be a proportionably greater profit on the larger one.² It may be presumed, however, that, if the valuation should be fixed at so large a sum as to warrant the belief that the transaction was merely a cover and with intent to evade the law, the courts would hold such a policy void as a wager.³ If it be objected that such an interest is analogous to the case of expected profits,

¹ *Bevin v. Connecticut Mut. Life Ins. Co.*, 23 Conn. 244; *Morrell v. Trenton Mut. Life & Fire Ins. Co.*, 10 Cush. (Mass.) 282; *Hoyt v. New York Life Ins. Co.*, 3 Bosw. (N. Y. Sup. Ct.) 440; *Miller v. Eagle Life & Health Ins. Co.*, 2 E. D. Smith (N. Y. C. P.), 268; *Trenton Mut. Life & Fire Ins. Co. v. Johnson*, 4 Zab. (N. J.) 576, 577.

² *Ibid.*

³ *Miller v. Eagle, &c. Ins. Co.*, *ubi supra*. See also *Wainwright v. Bland*, 1 Moody & Rob. 481; *Fox v. Penn., &c. Ins. Co.*, *ante*, § 108.

and that such are not insurable unless insured specifically, it is to be replied that an insurance upon a life is not an insurance of the life; it is rather an insurance of the benefits to result to the insured from the continuance of the life. These are all that render the life valuable to him. No pecuniary value can be set upon the life as upon property. Life cannot be the subject of valuation and sale. Labor and services, or the proceeds thereof, may be. A wife recovers upon an insurance on her husband's life, in view of the benefits to result to her from the continuance of his life; not because the life is of any value, irrespective of its devotion to her support and maintenance. A creditor recovers upon the death of his debtor, not because the life of the deceased was worth the amount of the debt, but because the expectation of payment of the debt is destroyed or impaired by the death. The insurance upon a life is in itself in the nature of an insurance upon profits. The very idea of a pecuniary interest in the life of another involves a claim, not to the life itself, but to some benefit resulting from or growing out of that life, and — except in the case of an annuity, derivable from some other source, but to endure only while the life shall continue — it involves also a claim upon the profits or proceeds accruing from the employment and efforts of the person whose life is the subject of the insurance. An insurance, therefore, upon the profits of a life specifically, would involve no idea that is not, from the necessity of the case, embraced in an insurance in terms upon the life itself.¹

§ 109 *c*. **Employé in Employer; Master and Servant.** — It is a very common thing in England for a clerk to insure the life of his master. If the clerk has a contract for service for a number of years at an annual salary, he has an insurable interest in the life of his employers to the amount which will be payable to him for the unexpired portion of his term, provided he continue in the service.² So a master

¹ Per Woodruff, J., *Miller v. Eagle Life & Health Ins. Co.*, 2 E. D. Smith (N. Y. C. P.), 268.

² *Hebdon v. West*, 3 Best & Smith, 578. This case was that of a clerk who, standing in the relation of a debtor to his employer, his employer having promised that while he lived the clerk should not be called upon to pay, took out a

has an insurable interest in the life of a servant, to whose services he has a legal claim.¹

§ 110. **Interest of Assignee.** — The general rule recognized by the courts is, that no one can have an insurance upon the life of another unless he has an interest in the continuance of the life. (a) To hold otherwise would be contrary to the general policy of the law respecting insurance, in that it may lead to gambling or speculating contracts upon the chances of human life. And although when the contract between the insured and the insurers is expressed to be for the benefit of another,² or is made payable to another than the representative of the insured,² or when an assignment to such other person is assented to by the insurers, the contract may be sustained; yet, if the assignee has no interest in the life of the subject of the insurance which would sustain a policy to himself, the assignment would only take effect as a designation, by mutual agreement of the contracting parties, of the person who should be entitled to receive the proceeds, when due, instead of the personal representatives of the insured. And if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained. The purpose of the clause in the policy, forbidding assignments without the

policy of insurance on the life of the creditor to the amount of the debt. But the court said that this interest in the life of the creditor was only an expectation that he would not call for the debt. It was a possibility of forbearance, an attempt to embrace the chance that the creditor would not do what he might do the day after the engagement was made, presenting a contingency not easily susceptible of pecuniary estimation, and they did not think that such a promise, without any consideration, or any circumstances to make it in any way binding, could be considered a pecuniary, or even an appreciable, interest.

¹ *Miller v. Eagle Life & Health Ins. Co.*, 2 E. D. Smith (N. Y. C. P.), 268.

² See § 112.

(a) An assignee of a policy, who has no insurable interest in the insured's life, can only retain so much of the proceeds, where the insurance was lawfully effected, as is necessary to reimburse him for premiums paid, expenses incurred, and interest thereon. *Beatty v. Downing*, 96 Va. 451; *New York L. Ins. Co. v. Davis*, id. 737; *Tate v. Com-*

mercial Building Ass'n, 97 Va. 74. In New York, an insurable interest in the payee is necessary, in the first instance, to the validity of the contract, but such interest need not continue, as in the case of a wife divorced from her husband; and the assignee of a valid policy may recover its full value. *Steinback v. Diepenbrock*, 158 N. Y. 24.

assent of the company, in concurrence with the policy of the law, is undoubtedly to guard against the increased risks of speculating insurance. The insurers are entitled to the full benefit of such a provision, as a matter of contract; and, as the policy of the law accords with its purpose, the court will not regard with favor any rights sought to be acquired in contravention of the provision.¹

§ 111. **Trustee.** — A peculiar case, involving the question of what constitutes an insurable interest, arose under the following circumstances: A., upon his marriage, gave a

¹ Stevens, Adm'r, *v.* Warren, Adm'r, 101 Mass. 564, 566. The question in this case was whether the assignee of a policy, a stranger without interest, notwithstanding assignment without the consent of the insurer, had any interest in the proceeds; and it was held that he had not, both upon the ground of the prohibition and upon the ground that such a transaction would be against public policy, as a mere speculation. But see Swick *v.* Home Ins. Co., 2 Dillon, C. Ct. (U. S.) 160, and *post*, §§ 112, 398. [Any one may insure his own life and assign the policy to whom he will if the transaction is not a mere cover for a wager. Langdon *v.* Union Mut. Life Ins. Co., 14 Fed. Rep. 272; 12 Ins. L. J. 548 Mich. (1882); *Ætna Life Ins. Co. v. France*, 94 U. S. 561; Conn. Mut. Life Ins. Co. *v.* Schaefer, 94 U. S. 457 (1876). A person has an insurable interest in his own life, and no use he may *afterward* make of the policy can convert it into a wager policy. Valton *v.* Nat. Loan Fund L. Ass. Soc., 22 Barb. 9. But if one having an insurable interest takes out a policy *for the purpose* of assigning it to one without interest, and the purpose is effected, the policy is a wager in the hands of the assignees. Keystone Mut. Ben. Ass. *v.* Norris, 115 Pa. St. 446. It was held in a Canada Court that if the applicant is unable to pay the premium, and a stranger steps up and pays it and takes an assignment of the life policy, prepared in the name of the applicant, the contract is void in his hands. Vézina *v.* N. Y. Life Ins. Co., 25 L. C. Jur. 232. But the Supreme Court reversed this, and held that if G. applies for insurance *bona fide*, and because he is unable to pay the premium L. pays it, and the policy is assigned to him, the payment relates back to the inception of the contract, the date of the policy, and there being no collusion between G. & L. the contract is not a wagering one. Vézina *v.* N. Y. Life Ins. Co., 6 Can. Supr. Ct. 30, Gwynne, J., dissenting. *Contra*, it has been held that one without insurable interest can acquire no title by assignment or otherwise to the sum payable on the death of the insured, and if the company pay it to such a person, the administrator of the insured may recover it from him less the assessments paid by him. Gilbert *v.* Moose, 104 Pa. St. 74. A policy on the life of one in which the insured has no interest, is void, and if a policy taken out by one on his own life is assigned to one without insurable interest, the case comes within the reason of the rule, and the policy is valid in the hands of the assignee only to the extent of his insurable interest. Helmetag's Adm'r *v.* Miller, 76 Ala. 183, 186. An assignment to one without interest can put him in no better position than he could be by taking out an original policy. The assignee will not be protected beyond the extent of his insurable interest. Warnock *v.* Davis, 104 U. S. 775.]

bond to secure £5,000 to his intended wife. Several years after the marriage, A. being in difficulties and unable to perform his bond, it was arranged that his wife should, out of her private income, keep up certain policies to be effected on A.'s life, in which he was to have no further interest than to carry out his bond. In pursuance of this arrangement A. insured his life by a policy, one of the conditions of which provided that policies effected by persons on their own lives, who should die by their own hands, should be void so far as regards the executors or administrators of the person so dying, but should remain in force only to the extent of any *bona fide* interest acquired by any other person under an actual assignment by deed for a valuable consideration in money, or by virtue of any legal or equitable lien as a security for money, upon proof of the extent of such interest being given to the directors to their satisfaction. The policy, together with the bond for £5,000, was, immediately on its being effected, handed over to T., as a trustee for A.'s wife, in whose hands they always remained. A.'s wife paid the premiums upon the policy in pursuance of the arrangement. A. died by his own hands, and a claim was made upon the insurance office by his executors for the amount of the policy, which was resisted. But it was held that T. had a *bona fide* interest in the policy by virtue of an equitable lien as a security for money within the meaning of the condition, and that the executors of A. were therefore entitled to recover.¹ (a)

§ 112. Interest of Payee or Beneficiary. — Whether, where

¹ Moore v. Woolsey, 28 Eng. L. & Eq. 248. "Proof . . . to their satisfaction" was held to be such proof as they ought to be satisfied with.

(a) See Cross v. National F. Ins. Co., 132 N. Y. 133. An assignee for creditors may insure the property held by him under the assignment. Sibley v. Prescott Ins. Co., 54 Mich. 14. A creditor has an insurable interest in the estate of his debtor when conveyed to an assignee in insolvency, but his interest is not a continuation of his former interest as owner of the insured property.

Brown v. Cotton & Woolen Manuf. Ins. Co., 156 Mass. 587; see Weed v. Hamburg-Bremen F. Ins. Co., 133 N. Y. 394. A judgment creditor, whose attachment has been followed by the levy of execution, begun but not completed, may insure the attached property and collect on the policy without accounting to the debtor. International Trust Co. v. Boardman, 149 Mass. 158.

a party effects an insurance on his own life, for the benefit of another who pays the premiums, the policy is a valid one has been doubted, but the weight of authority seems to be in favor of the validity; it being in substance a contract with the beneficiary, who is the "assured."¹(a) If the person

¹ *Wainwright v. Bland*, 1 Moo. & Rob. 481; s. c. 1 Mees. & Wels. 32; *Valton v. National Loan Fund Life Assurance Soc.*, 22 Barb. (N. Y.) 9; s. c. on appeal, 20 N. Y. 32; *Rawls v. Amer. Mut. Life Ins. Co.*, 27 N. Y. 282. [If the policy on its face runs to the "life" though payable to another who was active in the procurement of it, it will be presumed after verdict that it did constitute an insurance taken out by the "life" for the benefit of the other, and will not be invalid as a wager. *Fairchild v. North Eastern Mut. Life Ass.*, 51 Vt. 613.]

(a) Every person has an insurable interest in his own life to an unlimited extent; and he may insure it for the benefit either of his personal representatives or of a third person. *Nye v. Grand Lodge*, 9 Ind. App. 131, 143; *Stuart v. Sutcliffe*, 46 La. An. 240; *Hurd v. Doty*, 86 Wis. 1; see 35 Am. L. Reg. n. s. 65. In Wisconsin, such an assured may change the beneficiary named. *Breitung's Estate*, 78 Wis. 33. In general, the beneficiary named in a life policy need not have an insurable interest. *Robinson v. U. S. Mut. Acc. Ass'n*, 68 Fed. Rep. 825; *American Employers' L. Ins. Co. v. Barr*, id. 873; *Donnell v. Donnell*, 86 Maine, 518. The weight of authority now seems clearly to be that the taking out of a policy on one's own life for the benefit of another, who has no insurable interest therein, the former paying the premium, so far differs from an assignment that the beneficiary in the former case may recover on the policy, when the transaction is not a mere cloak for a wager. See *Heinlein v. Imperial L. Ins. Co.*, 101 Mich. 250; 25 L. R. Ann. 627, and note; *Souder v. Home Friendly Society*, 72 Md. 511; *Steinback v. Diepenbrock*, 158 N. Y. 24; *Albert v. Mutual L. Ins. Co.*, 122 N. C. 92; *Kentucky Life & Acc. Ins. Co. v. Hamilton*, 63 Fed. Rep. 93; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525; *Same v. Liersh* (Mich.), 29 Ins. L. J. 470. The fact that such beneficiary's claims are

not yet fully due is not material as to the insurer. *Hale v. Life Indemnity Co.*, 65 Minn. 548. An assignment to one having no insurable interest, which is merely a colorable evasion of the law against wagers, cannot be enforced. *Clement v. New York L. Ins. Co.* (Tenn.), 42 L. R. A. 247, and note. It is against public policy for one to procure insurance on another's life without his knowledge and consent; and even if a wife procures insurance on her husband's life without his knowledge or consent, paying his money therefor, he is entitled to recover it back from the insurer. *Met'n L. Ins. Co. v. Monahan* (Ky.), 42 S. W. 924; *Met'n L. Ins. Co. v. Trende* (Ky.), 53 id. 412. In Pennsylvania it is held that an absolute assignment, and surrender of control over the policy, to one having no interest in the insured's life, makes the policy void in the assignee's hands; but that insurance taken out by an elderly person and assigned by him to a poor child whom he befriends and educates, gives the child an insurable interest in his life. *Gilbert v. Moose*, 104 Penn. St. 74; *Vanormer v. Hornberger*, 142 id. 575; *Burke v. Prudential Ins. Co.*, 155 Penn. St. 295; *McHale v. McDonnell*, 175 id. 632; *Carpenter v. U. S. L. Ins. Co.*, 161 id. 9. In North Carolina, where a church member, on whom the church in part depended for support, but without any contract on his part therefor, applied for insurance on his

whose life is insured pays the premiums, there can be no doubt, even if the beneficiary has no interest, since his own interest supports the policy.¹ In *Forbes v. American Mutual Life Insurance Company*,² the insured took out a policy upon his own life payable to his sister's husband, paying the first premium himself, and the subsequent ones through the husband as his agent. The policy stipulated that "policies made payable to creditors or persons not belonging to the family of the person whose life is insured are subject to proof of interest." The court were inclined to the opinion that even under these conditions the plaintiff would be entitled to recover, though the point was not decided, since it was not raised by the pleadings. It was only held that there was an interest to support the policy.³

§ 113. **Beneficiary's Name must appear.** — So in England, under statute 14 Geo. III. c. 48, the name of the beneficiary must appear in the policy, as affirmed by the following case: The plaintiff married a wife who was a minor, and who was entitled to a legacy on arriving at her majority. The plaintiff asked the trustees to advance money in anticipation, to which they consented if A. would become surety. This A. consented to do if the plaintiff would insure his wife's life.

¹ *Campbell v. N. E. Mut. Life Ins. Co.*, 98 Mass. 381; *Hogle v. Guardian Life Ins. Co.*, 6 Robt. (Superior Ct. N. Y.) 567. The case of *Holabird v. Atlantic Mut. Life Ins. Co.*, 2 Dillon, C. Ct. (U. S.) 166, is apparently to the contrary. [A man may insure his own life, himself paying the premiums for the benefit of another, who has no insurable interest. *Scott v. Dickson*, 108 Pa. St. 6. A son may insure for the benefit of his father. *Tucker v. Mut. Ben. Life Co.*, 50 Hun, 54.]

² 15 Gray (Mass.), 249.

³ See *ante*, § 110.

life for its benefit, and, the policy being issued to the church, the premiums were paid by him, it was held that the church had no insurable interest in his life, and that the policy was void as a wager. *Trinity College v. Travelers' Ins. Co.*, 113 N. C. 244. A beneficiary who is named by the insured, but is without insurable interest, becomes, if he pays the premium, a trustee for the parties legally entitled. *Mutual Life*

Ins. Co. v. Blodgett, 8 Tex. Civ. App. 812. A general creditor, having no insurable interest in any specific property of his debtor, cannot insure it, but the debtor may with the insurer's consent, for the creditor's benefit, so far as the latter's interest may appear, as, *e. g.*, when security is thus given for advances. *Guterman v. German-American Ins. Co.*, 111 Mich. 626.

At plaintiff's suggestion the wife insured her life in her own name, without mention that any one else had an interest in the policy. This was held void under the statute 14 Geo. III. c. 48, which requires the name of the person interested in the policy, or for whose use or benefit, or on whose account the policy is taken out, as the purpose of the policy was to protect the surety. Although the wife might have an ultimate interest, the interest of the surety at the time of the insurance was clear, and it should have been so stated. And so also should the husband's name have appeared as a beneficiary.¹

§ 114. **Life Policy generally a Valued Policy.** — A life policy is almost always a valued policy,² but not necessarily so. Thus, *Bruce v. Garden*³ was the case of an insurance by a creditor who had a running and constantly varying account with his debtor, to secure himself against loss of the balance which might at any time be due him. Of course in such a case the measure of damages is the amount which may be found to be due at the death of the debtor, a loss which is to be determined by proof as in other cases of open policies. There were several policies in this case amounting to much more than the offices paid. What was paid was the actual amount of the balance found due at the time of the decease.

§ 115. **Interest in the Life need not continue till Death; English Cases.** — We have said that the general doctrine was, that in life as well as in fire and marine insurance there must be an interest at the time of the loss as well as at the time of insurance in order to support the policy.⁴ This subject has received a very careful consideration in the Exchequer Chamber, resulting in the conclusion that the doctrine for which *Godsall v. Boldero*⁵ has been constantly referred to as an authority — that there must be an insur-

¹ *Evans, Adm'r, v. Bignold*, 20 L. T. R. N. S. 659.

² *St. John v. Amer. Mut. Life Ins. Co.*, 2 Duer (N. Y. Superior Ct.), 419. [A life policy, unlike fire and marine insurance, is not a contract of indemnity, but an agreement to pay a specific sum. *Scott v. Dickson*, 108 Pa. St. 6.]

³ 20 L. T. R. N. S. 1002; s. c. on appeal to the Lord Chancellor, 22 id. 595.

⁴ *Ante*, § 29.

⁵ 9 East, 72.

able interest in the holder of the policy at the time of the loss as well as at the time of effecting the insurance — is not sound law, as applicable to life policies.¹ The question in this case, it being admitted that the plaintiff had no interest at the time of the death, was upon the construction of the statute 14 Geo. III. c. 48; as, independently of the statute, there could be no doubt that a life policy, without any interest to support it, was a perfectly legal contract.² And so it is to this day in Ireland, where the statute 14 Geo. III. c. 48, has remained in force.³

¹ Dalby v. India & London Life Ass. Co., 15 C. B. 365.

² Cousins v. Nantes, 3 Taunt. 513; Lucena v. Craufurd, 2 Bos. & Pul. N. R. 269.

³ British Ins. Co. v. Magee, Cooke & Alcock, 182. “This contract,” said the court, per Parke, B., after holding the case under advisement, “is good at common law, and certainly not avoided by the first section of the 14 Geo. III. c. 48. This section, it is to be observed, does not provide for any particular amount of interest. According to it, if there was any interest, however small, the policy would not be avoided. The question arises on the third clause. It is as follows: ‘And be it further enacted, that, in all cases where the insured *hath* interest in the life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers, than the amount or value of the interest of the assured in such life or lives, or other event or events.’ Now what is the meaning of this provision? On the part of the plaintiff it is said it means only that, in all cases in which the party insuring has an interest when he effects the policy, his right to recover and receive is to be limited to that amount; otherwise, under color of a small interest, a wagering policy might be made to a large amount, — as it might if the first clause stood alone. The right to recover, therefore, is limited to the amount of the interest *at the time of effecting* the policy. Upon that value, the assured must have the amount of premium calculated; if he states it truly, no difficulty can occur; he pays in the annuity for life the fair value of the sum payable at death. If he misrepresents, by overstating the value of the interest, it is his own fault in paying more in the way of annuity than he ought; and he can recover only the true value of the interest in respect of which he effected the policy; but that value he *can* recover. Thus, the liability of the assurer becomes constant and uniform, to pay an unvarying sum on the death of the *cestui que vie*, in consideration of an unvarying and uniform premium paid by the assured. The bargain is fixed, as to the amount, on both sides.

“This construction is effected by reading the word ‘hath,’ as referring to the time of effecting the policy. By the first section the assured is prohibited from effecting an insurance on a life or on an event wherein he ‘shall have’ no interest; that is, at the time of assuring. And then the third section requires that he shall cover only the interest that he ‘hath.’ If he has an interest when the policy is made, he is not wagering or gaming, and the prohibition of the statute does not apply to his case. Had the third section provided that no more than the amount or value of the interest should be *insured*, a question might have been raised, whether, if the insurance had been for a larger amount, the whole

§ 116. The injustice of the decision in *Godsall v. Boldero*¹ was so manifest, that it is not to be wondered at that the

would not have been void ; but the prohibition to recover or receive more than that amount obviates any difficulty on that head.

“ On the other hand, the defendants contend that the meaning of this claim is, that the assured shall recover no more than the value of the interest which he has at the time of the recovery, or receive more than its value at the time of the receipt.

“ The words must be altered materially, to limit the sum to be recovered to the value *at the time of the death*, or (if payable at a time after death) when the cause of action accrues. But there is the most serious objection to any of these constructions. It is, that the written contract, which, for the reasons given before, is not a wagering contract, but a valid one, permitted by the statute, and very clear in its language, is by this mode of construction completely altered in its terms and effect. It is no longer a contract to pay a certain sum as the value of the then existing interest, in the event of death, in consideration of a fixed annuity calculated with reference to that sum ; but a contract to pay — contrary to its express words — a *varying* sum, according to the alteration of the value of that interest at the time of the death, or the accrual of the cause of action, or the terms of the verdict or execution ; and yet the price or the premium to be paid is fixed, calculated on the original fixed value, and is unvarying ; so that the assured is obliged to pay a certain premium every year, calculated on the value of his interest at the time of the policy, in order to have a right to recover an uncertain sum ; viz., that which happens to be the value of the interest at the time of the death, or afterwards, or at the time of the verdict. He has not therefore a sum certain which he stipulated for and bought with a certain annuity ; but it may be a much less sum, or even none at all.

“ This seems to us so contrary to justice and fair dealing and common honesty, that this construction cannot, we think, be put upon this section. We should therefore have no hesitation if the question were *res integra*, in putting the much more reasonable construction on the statute, that if there is an interest at the time of the policy it is not a wagering policy, and that the true value of that interest may be recovered in exact conformity with the words of the contract itself.

“ The only effect of the statute is to make the assured value his interest at its true amount when he makes the contract.”

The court then proceed to say that *Godsall v. Boldero* was founded upon a mistaken analogy, the language of Lord Mansfield in *Hamilton v. Mendes*, 2 Burr. 1198, upon which Lord Ellenborough relied, having reference to a marine policy which is in its terms a contract of indemnity only ; that while it had been referred to in divers cases without calling it in question, and sometimes with approbation (*Vide Barber v. Morris*, 1 Moody & R. 62 ; *Humphrey v. Arabin*, 2 Lloyd & G. Ch. 318 ; *Henson v. Blackwell*, 4 Hare, 434, *cor.* Sir J. Wigram, V. C. ; *Phillips v. Eastwood*, 1 Lloyd & G. Ch. (Cas. temp. Sugden, 290) 321), yet in none of these cases was it material to controvert the point in question ; that in point of fact, in practice, it had been uniformly disregarded ; and that therefore they ought not to be bound by the authority of that case. The law is otherwise in this country. See *Ruse v. Mut. Benefit Life Ins. Co.*, 23 N. Y. (9 Smith) 516. As this statute is frequently referred to in the reports, it may be convenient to

¹ 9 East, 72.

insurance companies refused to avail themselves of its proffered shelter, and that it became practically a dead letter. But the error was not that it proceeded on a mistaken analogy, and treated the contract under consideration, like contracts in marine and fire insurance, as a contract of indemnity, but rather in a mistaken application of the principle. The court erroneously assumed that if the debt which constituted the insurable interest was paid after the death of the debtor and before action brought, the creditor was indemnified. He was indeed paid so far as the original debt was concerned; but he was not at all indemnified so far as the

have it in full. It is accordingly here subjoined. Statute 14 Geo. III. c. 48, enacts:—

First, “That no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons or on any other event or events whatever, wherein the person or persons, for whose use or benefit or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every insurance made contrary to the true intent and meaning of this act shall be null and void to all intents and purposes whatsoever.”

Second, “That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the name or names of the person or persons interested therein, or for what use, benefit, or on whose account such policy is so made or underwrote.”

Third, “That in all cases where the insured hath an interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers, than the amount or value of the interest of the insured in such life or lives, or other event or events.”

The fourth section contains a proviso that this act shall not extend to insurances *bona fide* made on ships or goods.

Professor De Morgan also (Essay on Probabilities, p. 244 *et seq.*; and see note appended to the case of *Dalby v. India & London Life Assurance Co.*, *ut sup.*) criticises the doctrine of *Godsall v. Boldero* with much force and piquancy, observing amongst other things that “the several principles on which the decision was founded, well carried out, as they say in Parliament, would require that the previous contracts of a man who becomes insane should be null and void; that the meat which a man buys for his dinner should be returnable to his butcher under the cost, if his friend should invite him in the mean time; and in the case before us, supposing that C. (the creditor) should have outlived the term, and his debt were paid as before, then B. (the assured) might have brought his action against the office for the return of the premiums; alleging that, as it turned out, the office would have been indemnified, and therefore should have been considered as having run no risk.” See also *Law v. Indisputable Life Policy Co.*, 1 Jurist, N. S. 178, where Wood, V. C., accepts and applies the doctrine of *Dalby v. India & London Life Assurance Co.*; *Whiting v. Sun Mut. Ins. Co.*, 15 Md. 297, 326; *McKenty v. Universal Life Ins. Co.*, C. Ct. (Minn.), 6 Ch. Legal News, 199.

new debt contracted by the insurers to the insured was concerned. In contemplation of law, and by the understanding of the parties, the annual payments which the insured agreed to make were the equivalent, and a profit beside, of the total sum which the insurers agreed to pay at the death of the debtor. So that, although subsequently to that time, and before suit brought, the original debt was paid by the debtor's executor, yet, as the creditor had, in contemplation of law, and according to the understanding of the parties, and possibly in point of fact, in the mean time paid to the insurers sums of money which in the aggregate amounted to a sum equal to that which he received from the debtor, he would suffer a total loss unless the insurers should pay him the amount of the policy. In fact, upon the doctrine of indemnity merely, correctly applied, the insurers should have been held to pay. The effect of the decision was, moreover, to make a new contract; to wit, that the insurers would pay the insured the amount of the debt, if some one else did not, — obviously a totally different contract from that which was actually made, and one, too, in which the creditor must either lose the original debt, or if that was paid, then he must lose the amount which he had paid by way of premiums. Thus by the decision of the court the creditor could in no case be indemnified, but, on the contrary, in every case must be the loser. The contract was certainly for an indemnity in the beginning, and had it been enforced according to its terms it would have proved to be an indemnity in the end. This contract of insurance on the life of the debtor to protect the creditor is closely analogous to the mortgagee's insurance on the house of the debtor to protect his mortgage. In one case the creditor insures on the life, in the other on the property, of the debtor. In each case the contract is a separate and distinct collateral contract which the insured has a right to make for his own benefit, and there seems to be no doubt that the mortgagee, whether he insures as general owner or as mortgagee, may recover the full amount insured, without prejudice to his mortgage debt, which, whether it be paid or unpaid, is a matter of no

concern to the insurers.¹ If a mortgagee insure for a year the house of his debtor to secure a mortgage note payable in a year, and there happens a total loss within the period, he recovers his insurance and still holds his note. So if a creditor insures the life of his debtor for a year to secure a note payable in a year, and the death happens within the period, he gets his insurance and still holds the note. In each case there is indemnity as between the insurers and the mortgagee and creditor, though by reason of their relations with strangers to the insurers the mortgagee and creditor may make an actual profit in the end by collecting their respective notes. If the insurer contracts to indemnify in one case, so he does in the other; and neither is the less a contract of indemnity because the insured by his relations with others may make the double transaction a profitable investment or speculation. A man insures his house for a term of years to protect his estate; and he insures his life for a term of years for the same reason. If the house be burned the estate is indemnified for the loss of property; and if the life be lost the estate is indemnified for the loss of faculties which produce property. In either case there is indemnity simply. In one case the amount of loss may or may not be open to proof. In the other the amount of loss

¹ *King v. State Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 1; *Suffolk Fire Ins. Co. v. Boyden*, 9 Allen (Mass.), 123; *Concord Mut. Fire Ins. Co. v. Woodbury*, 45 Me. 447; *Clark v. Wilson*, 103 Mass. 219, 221; *People's Ins. Co. v. Straehle*, 2 Cin. Superior Ct. Repr. 186; *post*, § 456. And so the mortgagee may recover the whole amount of his insurance if the loss amounts to so much, although the property remaining after the fire is ample security for the debt, or be restored to its original value. *Rex v. Insurance Cos.*, 2 Phila. Rep. 357; *Kernochan v. New York Bowery Fire Ins. Co.*, 5 Duer (N. Y. Superior Ct.), 1; s. c. affirmed 17 N. Y. 428; *Motley v. Manufacturers' Ins. Co.*, 29 Me. 337; *Foster et al. v. Equitable Mut. Fire Ins. Co.*, 2 Gray (Mass.), 216. But a mortgagee who so insures without the authority of the mortgagor cannot charge the premium against the mortgagor. *Dobson v. Land*, 8 Hare, 216. See also s. c. and note, 3 Bennett's Fire Ins. Cases, 197; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, affirming s. c. 7 Lans. (N. Y.) 138; *Armitage v. Winterbottom*, 30 E. C. L. 379. So the insured who has contracted to sell before the loss may recover the full amount of the loss although after the loss and before suit he receives the contract price, there being a parol agreement to assign the policy with the consignee of the property. *Fire & Mar. Ins. Co. v. Morrison*, 11 Leigh (Va.), 354. And see also *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421.

is fixed by the valuation in the policy and the agreement of the parties. But it is none the less an indemnity because it is agreed on.¹ Mortgagees and creditors may claim indemnity of the insurers with whom they directly contract, though they may have chances to get something beyond that from others, and in this sense their contracts may, though not with strict accuracy, be said to be not contracts of indemnity merely. This, it is apprehended, is all that is intended by the court in the case of *Dalby v. India and London Life Assurance Company*.² That case decides only that as at common law the contract of life insurance may be supported without any insurable interest in the insured either at the inception of the contract or at the death of the life, and as under statute 14 Geo. III. c. 48, only an insurable interest is requisite at the inception of the contract, it is not necessary that the insured should have an insurable interest at the time of the death. In other words, under that statute the contract is one of indemnity at its incipency, but by the common law, which is not affected by the statute, it need not be one of indemnity, — that is, supported by an interest, at the time of the death.

§ 117. *Continuation of Interest in the "Life;" United States cases.* — The courts of this country have, however, as we have seen,³ almost without exception⁴ refused to adopt the doctrine of the English common law in support of policies without interest, and it remains to be seen whether they will so far modify the rule as to uphold a policy where the insured has an interest when the contract is made, but has none when the event happens upon which the policy becomes payable. That the insurable interest need not have uninterrupted continuity, but may revive after suspension, has before been adverted to.⁵ In the Supreme Court of the United States⁶

¹ *St. John v. American Mut. Life Ins. Co.*, 2 Duer (N. Y. Superior Ct.), 419; *ante*, § 7.

² *Ubi supra*.

³ *Ante*, § 75.

⁴ [This can hardly be said now. See cases below.]

⁵ *Ante*, § 101.

⁶ *Phoenix Mut. Life Ins. Co. of Hartford v. Bailey*, 13 Wall. (U. S.) 616.

it has been said that the contract of life insurance was not one of mere indemnity, and that an insurable interest was only necessary at the inception of the contract. But the point decided was simply that that court would not exercise its equity power when there was an adequate remedy at law; and the cases referred to as supporting the *dictum*,¹ with the exception of the English case, are not authorities, since in all of them, in point of fact, the interest existed at the time of the death as well as at the inception of the contract. There are *dicta*, however, in the New York and New Jersey cases referred to, as also in other cases,² which would seem to support the view that a continuing interest in a life policy is not necessary.³(a) Upon the whole, it is not improbable that, when the point is distinctly taken, it will be held that when the contract at its inception is based upon a substantial interest, and is in good faith entered into for the protection of that interest, it is not objectionable as a wager contract, and may be enforced though the interest may have ceased at the time of the death.

¹ Dalby v. India & London Life Assurance Co., 15 C. B. 365; Loomis v. Eagle Life & Health Ins. Co., 6 Gray (Mass), 396; Lord v. Dall, 12 Mass. 114; Trenton Life & Fire Ins. Co. v. Johnson, 4 Zab. (N. J.) 576; Rawls v. American Life Ins. Co., 36 Barb. (N. Y.) 357; s. c. 27 N. Y. 282. Emmet, J., dissenting, on the ground that, before the death of the debtor whose life was insured, the Statute of Limitations having run against the note which constituted the basis of insurable interest at the inception of the contract, the interest had ceased, and so the action could not be supported. But this ground of dissent is not well founded. See *ante*, § 108. See also Porter v. Ætna Ins. Co., 6 Ins. L. J. 928, *contra*, which, however, is doubtful law. An absolute though defective title is good as a basis of interest till set aside. *Ante*, §§ 86, 89.

² Valton v. National Loan Fund Life Assurance Co., 22 Barb. (N. Y.) 9; St. John v. American Mut. Life Ins. Co., 13 N. Y. 31.

³ But see *contra*, Mut. Life Ins. Co. v. Wager, 27 Barb. 354; Kennedy v. New York Life Ins. Co., 10 Ea. An. 809, dissenting opinion of Mr. Justice Lee; Leonard v. Eagle Life & Health Ins. Co., 4 Liv. Law Mag., per Ch. Walworth as arbitrator.

(a) In New Jersey, it has recently been held that though the insured had no insurable interest when the policy was issued to him, yet the policy will be supported if there is such an interest during the risk and at the time of the loss. Sun Ins. Office v. Merz (N. J. L.), 45 Atl. 785.

The objection that the plaintiff's pleadings do not set out an insurable interest comes too late after verdict. Kentucky L. & Acc. Ins. Co. v. Hamilton, 63 Fed. Rep. 93, 102.

And this is the more probable, as, while such a rule will keep the door shut against mere gambling and speculation, it will tend to encourage what is now almost universally regarded as a provident contract, securing not only an indemnity in case of loss, but the means of presently increasing capital, and a not disadvantageous mode of investment. So it has now been distinctly held in the Supreme Court of the United States;¹ [and later cases in Pennsylvania and the United States courts make the authority to this point very emphatic.²] The conclusion is, upon all the authorities, that life insurance, like all other kinds of insurance, is a contract of indemnity; but that that form of the contract, in some of its phases, is not merely a contract of indemnity, but includes that with a possibility of something more. It can never therefore properly be entered into except for the purpose of security or indemnity;³ though the fact that the contract may, under certain circumstances, result as a profitable investment, does not vitiate it, if entered into in conformity to the principles which underlie it.⁴ But so far as it seeks any other object than indemnity for loss, it departs from the legitimate field of insurance, and engrafts upon that contract a purpose foreign to its nature.

¹ Connecticut Mut. Life Ins. Co. v. Scheafer, 94 U. S. 457.

² [See § 100, A.]

³ *Ante*, § 2.

⁴ [True justice would give the balance of the funds beyond the debt, premiums, interest, and expenses, to the debtor's representatives, and there is some good authority to this effect. *Seegrist v. Schmoltz*, 113 Pa. St. 326, and see ch. 24.]

CHAPTER VII.

AGENTS. — THEIR POWERS AND DUTIES.

ANALYSIS.

1. OF THE GENERAL PRINCIPLES OF AGENCY, AND SPECIALLY OF AGENTS OF STOCK INSURANCE COMPANIES.

An agent must not be interested adversely to his principal, if same person acts for both parties either may avoid the contract, §§ 125, 137. cannot insure property of which he is owner or part-owner unless the company is fully aware of the facts, and constructive knowledge by putting the papers on file in home office is not enough. *Id.* cannot consent to assignment of his own policy, § 137.

POWER TO BIND THE COMPANY.

An agent's authority is governed by the nature of his business. Acts, waivers, representations, &c., in the *usual* course of business will bind the principal in spite of private instructions, unless the other party had notice of them. The authority of an agent is what it appears to be; as between the company and third persons the question is not what power the agent did have, but what the company held him out as having. Out of the usual course of business, the assured must be sure the agent has express authority. Authority to two persons terminates with the death of either, §§ 126, 126 A, 154.

Difficult to determine the scope of an insurance agent's powers, § 118.

May solicit risks, and make statements concerning the character and standing of the various companies, §§ 119, 133.

He has incidental power to decide upon the proper description of property, the meaning of words in the questions, and the application of answers to the subject-matter, so far as may be necessary to render the instrument fit for its purposes and make the agency an efficient one, §§ 120, 123, 144 E, 144 G.

the agent's discretion may vary with his remoteness from the home office, § 120.

Agent of stock company intrusted with policies signed in blank has full discretion as to amount and nature of risk, terms, conditions, &c., even to the modification of the policy, § 129 and note.

Within the powers of the corporation its agents may bind it by parol, §§ 128, 129, 141-145, 151; see also, §§ 14-25.

May insure in respect to property beyond his district, § 130.

2. AUTHORITY AS TO PREMIUMS (§§ 121, 129, 134-136).

Discretion about the mode in which premiums shall be paid, limited by usual course of business. Agent may by his interpretation fix the date the premium is due, § 134.

Neglect of agent to forward premium will not prejudice the insured.
Where the agent is a broker. A receipt for the premium stating that the contract takes effect from its date binds the company, though the premium is not actually paid till after the fire, § 135.

If an agent receives premiums upon a life policy knowing of a change of residence in violation of the policy, which the agent said would not affect it if the premiums were paid, the company may be held, on the principle of constructive notice, since it was the duty of the agent to inform the home office of the conditions under which the premiums were paid, § 136.

Agent may waive forfeiture for non-payment of premium before or after it is due, § 136.

An agent may perhaps employ a detective, but cannot institute criminal proceedings so that his acts will bind the company, unless specially authorized, § 133 F.

3. ERROR, NEGLIGENCE OR MISREPRESENTATION BY THE AGENT.

Mistakes, omissions, even in some cases representations or opinions of a matter of law, on the part of an agent within the scope of his business, will bind the company, §§ 131, 135, 142.

A corporation cannot saddle the blunders of its agents on its customers. If, however, the insured combines with agent to cheat the company the latter will be protected, § 131.

(See 4, 5, and 6.)

Misrepresentations and torts of agent. Same rules apply as in the case of other contracts. Mere opinion, embellishment or chaffer, will not bind the company, nor statements upon which a man of ordinary prudence would not rely, §§ 133, 133 C.

Representation that the company takes risks in a place where it does not, will not prejudice the company, § 133.

Unauthorized representation of agent that neglect to pay premium would only convert the policy into a paid-up policy, binds company so far as to prevent forfeiture because insured has acted on it, § 133.

Misrepresentation that non-occupancy avoided policy, whereby insured settled for one-fourth, is not actionable, § 133.

Misrepresentation as to rival company not release insured from duty to pay premium, § 133.

Misrepresentation that policy is not subject to assessment, entitles the insured to such a policy, § 133.

Where full printed information is given to the insured he must not rely on the agent's remarks, § 133.

nor without inquiry on the remarks of a stranger though in presence of an officer, § 133.

Representations not to bind company, unless reduced to writing and sent to home office, § 133.

4. NOTICE.

Notice to agent in the scope of his business is notice to his principal, §§ 132, 152.

An agent appointed to receive and transmit the kind of notice in question, receiving it as such agent, binds the principal, and one acting in the principal's business to which the notice relates, with the knowledge

in his mind, or so recently acquired as to be presumably present in his mind, binds his principal by his knowledge, no matter when, how, or where he received the knowledge (§ 133 D), unless there is collusion, or the third party knows or has reason to know that the agent does not inform the principal.

Where the agent does not act in the matter to affect the validity of which the notice is pleaded, nor is appointed to forward such notice in respect to the use in question, his knowledge is not that of the principal as affects said matter, §§ 122, n, 133 E.

Grounds of holding the company are communication and identity. The agent while acting for the company within the scope of his authority is identified with the company; and notice coming to him during such business and relating to it binds the company. Notice coming to the agent at some time while not acting for the company in the business to which it relates, *may* bind the company, on the ground that it was the agent's duty to communicate facts known to him and affecting his principal.

5. *Facts known to agent at time of insurance or at delivery of policy*

bind the company, §§ 133, 133 A-133 G.

condition of health, § 133 A.

prohibited articles kept, § 133 A.

gasolene kept on premises, § 133 A.

buildings not all on plaintiff's ground, § 133 A.

interest of assured known to agent, § 133 A.

agent knew of incumbrance, § 133 A.

other insurance, § 133 A.

even though falsely stated by assured? § 133 A.

agent's notice of inaccuracy in the application binds the company, § 142 F.

an agent's acts in procuring insurance, making out applications, &c., and his knowledge obtained in such business bind the company. Such an application is not the instrument of the person whose name is signed to it. The circumstances under which it was obtained estop the company, §§ 133, 133 A, 133 B, 144.

if, in filling the application, by mistake or intent he omits or misstates matters correctly told him or known to him, and the assured signs the statement without reading and in ignorance of the omission or mistake, the company is bound, §§ 141, 144 A.

there being no collusion to cheat the company or its equivalent, §§ 144 B, 137.

as where the assured has reason to know that the company is being imposed on, §§ 133 B, 137.

even though the policy makes the statements warranties, §§ 144 A, 133 A.

(*Contra*, even knowledge of company itself will not save the assured in case a warranty is broken, §§ 145, 156.)

and the agent's knowledge was obtained in another transaction, § 144 B.

and the policy provides that the agent acts for the assured, §§ 124 A, 144 B, 140, 144 E, 144 G.
 and that no agent shall waive any condition, § 144 C.
 and a copy of the application is attached to the policy, § 144 C.
 an application made by agent with knowledge of facts is conclusive on company by statute in some States, § 145 B.
 so where the agent causes the assured to make a misstatement or omission, the latter acting in good faith, § 144 E.
 or where both are ignorant of the truth and the agent makes a misstatement, § 144 E.
 but statements to agent at a fruitless interview prior to the one at which the insurance is made do not bind company, § 144.
 and if the policy describes the wrong building though by agent's error, it is void, § 144 F.
 limitations by terms of policy, § 137.
 usage may overcome, § 137.
 premiums only payable on company's receipt, § 137.
 excluding saloon risk, knowledge of agent not bind company, § 137 A.
 prohibited article avoids policy though agent knew it was kept, § 144 F.

6.

Massachusetts, Rhode Island, New Jersey, Pennsylvania, Canada, and Nova Scotia, however, regard the admission of parol to show that the insurers knew the contrary of that which is stated in the application as a violation of the rule against varying a written document by parol, and refuse to receive such evidence, although the application was made by the agent; Massachusetts going to the same length even where the insurer himself or a general agent making contracts knew the truth, § 145.

The true rule seems to lie between the Massachusetts doctrine and that of the majority of the States. It surely cannot prejudice the company to hold that it knew what it *did* know, nor is it fair to relieve the assured, where the company has been really misled, simply because he was too careless to read the application he signed, although he was able to do so, and knew or ought to have known that the agent was only a solicitor, the contract being made at the home office. (Discussion of whole subject, § 144 G.)

The company should be held, if it knows the truth, or connives at the agent's wrong, or the agent having knowledge of the facts is a general agent making contracts himself, § 144 G.

or a verbal application is accepted, and afterwards the agent makes a written one without authority from the assured, §§ 144 D, 145.
 (unless it is afterwards adopted, § 141.)

- or there is a usage or other evidence, to show that some or all of the statements may be made by the agent on his own authority and are so understood, although the assured signs the paper, he being innocent of intended wrong, §§ 132, 144 G.
- or reading the papers and other proper acts of care would not enable the insured to discover the error or fraud, as where the agent substitutes a forged application for the true one signed by the assured, §§ 144 D, 144 G. (Iowa case.)
- or where the assured with good faith and prudence is led by the agent's advice into a mistake, § 144 E.
- as to make an omission, § 133 A, n.
- or the agent takes advantage of an ignorant applicant, §§ 144 B, 144 E.
- (it is doubtful if even the delivery of a policy to one who cannot read is notice, § 144 E; see § 144 G.)
- If the company is innocent and the assured agrees with the agent to cheat the company, §§ 133 B, 143.
- or knows that a wrong statement is being made, § 144 F.
- or has good reason to know that the agent is not acting fairly and for the company's interest in the matter, §§ 133 B, 137, 143, 144 B, 144 F, 144 G.
- or signs to an untruth that he could correct if he took pains to read the paper he signs, in dealing with a soliciting agent, §§ 143, 144 E, 144 G, 145 A.
- or contents himself with telling such an agent material facts without putting them in the application, § 144 F.
- he should recover nothing if he acted in bad faith, and only his premiums and interest if merely careless. The fact that his signature is required is sufficient notice to him that the company does not rely on the agent to state the facts to them, § 144 G.
- the applicant is *presumed* to read the statements he signs, and the burden is on him to show the contrary, §§ 144 E, 159.
- If the policy provides that the assured adopts and warrants the application, or that the company will not be responsible for any statements the agent did not put in the application, the assured is bound, in the absence of fraud or fault in the home office, §§ 137 A, 140, 141, 144 F, 145 A.
- even though the application was originally unauthorized, § 141.
- if the agent making the application is not the agent of the company, or in any case where the assured makes him his agent to get the facts, he is bound, §§ 144 G, 145 A.
- neglect of agent to get insured to sign the application, company estopped, § 133 C.
- or to transmit, till after loss, company estopped, § 133 C.
- agent destroying policy, company bound, § 133 C.

notice to an agent of subsequent insurance or alienation held not to bind company in Pennsylvania and Massachusetts, § 153.

but notice of increase of risk was held binding in a Pennsylvania case, § 150.

7. AUTHORITY AFTER NEGOTIATIONS ARE COMPLETED.

Once the contract is complete the agent's discretion for the company as to matters subsequently arising is much less than his discretion during the negotiations, §§ 129, 138.

it behooves the insured therefore to inquire carefully as to the agent's powers in subsequent dealings, § 138.

We have seen above under "Notice" and "Premiums," some of the law of this topic.

A General Agent may orally extend an open policy over other property similar to that which it already insures, may correct an error in policy after issue, waive proof of loss (Massachusetts *contra*, § 126), prepayment of premium, notice of other insurance, and conditions as to countersigning, bringing suit, making repairs, leaving property vacant, &c., §§ 128, 129, 151. See also, §§ 14-25. may adjust loss, cancel policy, § 138.

receive notice of increase of risk, § 150.

may waive change of residence or nonpayment of premium, § 136.

can modify or cancel any contract he can make, § 129, n.

and consent to further insurance or change of title, § 143. Pennsylvania and Massachusetts *contra*, § 153. (See above under "Notice.")

the tendency of the courts is to hold the company to the acts of its agents, in favor of one relying on them without fault, § 143.

Evidence of general agency, § 126.

possession of blank policies and receipts are evidences of general agency, § 126.

whether an agency is general is a question for the jury, § 126.

the assured bound to know if agent is general or special, § 138.

8. MISCELLANEOUS.

Agent of foreign company to receive service, § 126.

authority to allow change of risk carries power to waive forfeiture by change, § 126.

authority to settle for loss carries right to extend time for settlement, § 126.

courts tend to enlarge powers of agents, § 126.

contract by officers beyond their powers under the charter and by-laws may be good, § 126.

agent cannot ratify a contract void by fraud *ab initio*, § 136 A.

agent cannot reinsure his company's risks without special authority, § 126 A.

mere soliciting agent cannot assent to assignment, § 138.

nor waive proofs, § 129.

nor alter policy to make it payable to another than the assured, § 130 A.

nor assent to assignment, § 138.

an alteration of a policy may be ratified, § 130 A.

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an alteration by agent without authority voids policy, but company held by first intention of parties, § 130 A.
provision in policy is notice of limitation of agent's authority as to waiver of renewal premiums, § 126.
provision on back of policy not notice, § 126.

9. WAIVER.

Receipt of premium by book-keeper does not waive, § 136 A.
by agent authorized to take premiums after knowledge waives a change of residence, § 136.
or forfeiture for non-payment, § 136.
secretary may waive breach, § 136.
by usage, § 137.
by usual course of business, of condition as to written assent to assignment, § 139.
No waiver —
of written assent to increase of risk, § 137 A.
or removal, § 137 A.
of non-payment when policy provides that agent cannot vary it, § 137 A.
if policy restricts right to waive to home office, § 137 A.
or declares that the agent is not to vary the policy, § 137 A.
such provisions valid as to waivers attempted *after* issue, § 137 A.
not as to those before issue unless brought to notice of assured, § 137 A.
usage may overcome the provision entirely, § 137 A.
of proofs of forfeiture by adjuster, § 138.

10. COMPANY *v.* AGENT.

Company may recover difference between premium charged and what ought to have been charged if agent had disclosed facts, § 138 B.
agent no claim because his term of office is broken by insolvency of company, § 138 B.
agent exonerated by honestly adopting one of two possible interpretations of an order from company, § 138 B.
Cessation of agency :
when company goes out of business, § 138 C.
proofs sent to one who has ceased to be agent good if assured no notice, § 138 C.
promise to renew by such agent only makes him personally liable, § 138 C.
annual license to company in name of agent gives him no right to hold to the end of year, § 138 C.
Agent's authority may be limited by the terms of the application and the policy, § 137. See § 140.

11. AGENTS OF MUTUAL COMPANIES.

Agents of mutual companies governed by much the same principles as agents of stock companies. Any customary exercise of authority known to the principal and not repudiated will bind him, § 139.

The agent acts in the negotiations only as agent of the company and not of the assured, for the latter is not a member of the company until the contract is made, § 131 ; and a stipulation in the policy or in the by-laws that the agent of the company is also the agent of the insured will not make it so if the fact is otherwise. Acts done on behalf of the insurers and without the authority of the insured do not bind the latter.

An agent's overestimate of value binds the company. If an agent neglects to state an incumbrance mentioned by the insured, company cannot set up his negligence, § 140.

The law construes the powers of agents of mutual companies more strictly than those of stock company agents, § 127, and in Massachusetts the decisions are very strict, it being held that such agents cannot bind the company contrary to by-laws, §§ 145, 146. Except that by-laws not of the essence of the contract, such as those that relate merely to the form and mode of proving loss, may be waived, § 147.

In Pennsylvania also the distinction between mutual and stock companies is emphasized, §§ 148, 149.

See on this subject also the whole text from § 139 to § 151, especially the decision of the United States Supreme Court that a mutual company is bound by the acts and knowledge of its agent in drawing up the application as it is ordinarily done, just as a stock company is liable under the same circumstances. The application really is often the act of the *insurers*, § 144.

secretary as agent of directors, § 139.

directors may appoint president to indorse, § 139.

12. AGENTS OF ACCIDENT INSURANCE COMPANIES, § 155.

Sub-agents.

General agent may appoint sub-agents, local agent cannot, §§ 126, 154 A.

Any sub-agent or clerk appointed by an agent with consent or recognition of the company may bind it. The service of an insurance agent is not personal, and he has an implied power of delegation unless restricted, § 154.

Knowledge of, binds company, §§ 132, 140, 154 A.

Agent's responsibility for, question for jury, § 154 A.

13. AGENTS OF THE INSURED.

Principal bound by acts of his agent, § 122.

if same person is agent of insured and the company, notice of cancellation to him is good, § 122.

One recovering insurance money may show, when sued for it, that he was the agent of one who had an insurable interest, § 122.

Persons referred to by the applicant become his agents for the purposes covered by the reference doctors, broker, § 123.

Responsible for ordinary care. One having general authority to insure for another may not choose a mutual company, § 124.

effecting insurance with irresponsible persons is negligence, § 124.

measure of damages in such case, § 124.

that agency gratuitous no defence, § 124.

assured may ratify contracts made for his benefit but without authority, § 122 A.

full knowledge of facts necessary to valid ratification, § 122 A.

constructive knowledge sometimes held sufficient, § 122 A.

acceptance of policy ratifies agent's act in giving a premium note, § 122 A.

Agent to procure insurance no power to cancel, § 138.

14. WHOSE AGENT, §§ 124 A, 144 G.

Medical examiner agent of company, but may not advise as to filling up application, § 123.

persons referred to, how far insured responsible for their statements, § 123.

statements of the "life," § 123.

broker employed to effect insurance, agent of one who employs him, §§ 123, 124 A.

an insurance agent who goes to another, to place part of risk without insured's knowledge, does not bind him by misrepresentations, § 124 A.

but if he acts with authority of insured he is his agent, § 124 A.

clause in policy declaring company not bound by acts of agent will not be operative; the *facts* must determine whose agent the actor is, §§ 124 A, 140, 144 B, 144 E, 144 G.

Iowa statute, soliciting agent to be deemed agent of company in spite of any agreement to the contrary, § 124 A.

agent keeping lists of policies for the assured acts as his agent, and the memoranda will not be evidence of recognition of policy by the agent's company, § 124 A.

if assured asks the agent to gather facts for him he makes him his own agent, § 145 A.

15. Proof of agency must be given by assured, § 138 A.

power of attorney or resolution of directors good evidence, but not necessary, § 138 A.

habit of paying policies issued by agent sufficient, § 138 A.

receiving application and premium, and issuing policy through agent, sufficient, § 138 A.

declaration of agent no evidence, § 138 A.

foreign agents must have certificate of auditor (Illinois), § 138 A.

§ 118. **Agency.** — The contract of insurance is in many, perhaps, more recently, in most cases made through the intervention of agents. This gives rise to a multitude of questions, the solution of which more properly belongs to a treatise on the law of agency. Some of these questions, however, are so intimately connected with the subject of insurance, having, so to speak, grown out of its peculiarities, as to require special notice in this connection.

All incorporated companies must necessarily act through agents, and their respective officers are specially appointed and clothed with powers, more or less specific, to facilitate the transaction of business. To these, in case of emergency, are added special or general agents, who at home and abroad exercise very extensive powers. What is the fair scope of the authority of these agents, now so numerous, to whom are intrusted the duties, partly or wholly, of soliciting risks, receiving and forwarding applications, — being supplied with blanks for that purpose, — receiving premiums and deposit notes, and delivering policies? This question has given rise to some of the most perplexing difficulties, and to a larger proportion, perhaps, than any other, of the controversies in courts of law. And upon a superficial examination of the cases there would seem to be an inextricable confusion, if not an irreconcilable contradiction of opinion. But upon a more careful examination there will almost always be found shades of difference in the facts and circumstances, upon which apparently opposite opinions are founded, sufficient to relieve them from the element of contradiction. Still, for the very reason that there is in so many cases in the midst of a general similarity a particular dissimilarity of circumstances, it is difficult, not to say impossible, to embrace within any formula of words rules that would be sound and reliable. It will doubtless be more satisfactory to state the questions which have arisen, and are likely to arise, with their judicial solution, under each particular head.

§ 119. **Authority in soliciting Risks.** — And, first, in soliciting risks, with what powers is the agent clothed? Of course it must be desired and expected by the principal that the agent in this particular will use due diligence — the greater the better, if not unauthorized — in procuring risks and extending the business. This implies that something is to be said of the character, standing, and merits of the company, and of its desirability as a means and protection. And by his statements of fact in this behalf the insurers will be bound.

§ 120. *Authority as to Application.* — But, second, and most important of all, what is the extent of the agent's power with reference to the duty of receiving and forwarding the application? Can he to any extent, and if any, to what, bind the company by intervening and aiding in the filling up of the application? That he can so do, to some extent, there can be no reasonable doubt.¹ He is appointed by the company to facilitate and promote their business. To this end he is furnished with the necessary blanks, which, after they are filled up, he is to forward to the company's office. Of course this filling up must be in such manner as to make the application fit for its purpose, and valid as the basis of the contract. The questions propounded therein are those upon which information is desired. These are often very numerous, and not unfrequently quite general and indefinite, and susceptible of being answered briefly and substantially, or with greater or less minuteness of detail. How briefly, and with what degree of minuteness, the applicant may not know. The agent must be presumed to be clothed with the power to say when the question is satisfactorily answered, that is, with sufficient fulness. Or in answering some of the questions it may not be easy to state exactly what the true answer is upon the facts. Viewed in different lights, or from different stand-points, the same question upon the given facts may admit of different answers. Cannot the agent say for the company from which stand-point they shall be regarded, and, having become possessed of all the facts, may he not say which answer ought to be given? Is the building to be insured a shop or a store? All the facts being made known, and the answer being a matter of doubt, may not the agent, instead of encumbering the papers with a multitude of details, agree for the company that it is either, according as he thinks the facts show it to be? His experience ought to enable him to judge of the true answer, and whether the details ought to be set out, better than the applicant, who wishes only to answer truly, and is indifferent as to which answer shall be

¹ [See end of § 144 G.]

given. May he not without risk accede to that answer which the agent assures him will be the more proper and satisfactory? There must be, it would seem, an incidental power lodged in the agent, adequate to the explanation of the proper description of the property or interest to be insured, the meaning of the words and phrases used in the questions, and the application of answers to the subject-matter, so far as they may be necessary to perfect the instrument and render it fit for its purpose, and promote the usefulness and efficiency of the agency. In short, the agent may do in this behalf what could be done at the home office, if the application were filled up there upon conference with the officers; and that the agent may have answered some questions differently from what they would have been answered there, does not make his act the less binding upon the company. The fair inference from the fact of appointment is, that the agent is a suitable person and conversant with his business. The applicant naturally and rightfully so looks upon him. It cannot be supposed that he is so restricted and tied down as to destroy his usefulness to the company; and yet if agents so appointed are not to be allowed to say a word by way of information or explanation, when fairly and honestly attending to their appropriate business, which shall attach to the contract and bind the company, it is easy to see that dealing with an agent can be neither satisfactory nor safe; and insurance companies would at once find their business confined to the limited sphere of negotiations with those only to whom the home office is accessible, — a result which, it is fair to assume from their history and mode of doing business, they by no means desire.¹

It is, moreover, always worth while in considering the question of the extent of the authority of an agent to look to his relations to the company in point of place. If he is remote from his principal, and so situated that were he

¹ *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465; *Insurance Co. v. Colt*, 20 Wall. (U. S.) 560, 567; *Spring Garden Mut. Ins. Co. v. Scott*, Leg. Int. March, 1870.

obliged to refer questions of doubt which arise within the general scope of the duties to which he is appointed, his usefulness and efficiency would be materially impaired by the consequent delay; it is fair to presume that a more liberal exercise of discretion is permissible to him than to an agent having the same general powers, but residing so near to his principal that reference may be practicable and consistent with the success of the agency.¹

§ 121. **Authority as to Premiums.** — And, in the third place, what is the extent of the authority of such agents in the matter of the receipt of premiums, whether in money or in notes, &c.; and, in general, in binding the company by terms and conditions not known to them, except constructively, and by waiving terms and conditions stated in the policy, and subject to which alone, as a general rule, they are willing to assume, and do assume, the responsibilities of the contract.

With these few general observations, designed to direct attention to the various questions likely to arise, and perhaps to indicate to some extent what is conceived to be the spirit and drift of the law, we shall now proceed to call attention to the several causes which may serve to illustrate these suggestions.

§ 122. **Agent of Insured.** — The agent of the insured to effect insurance is to all intents and purposes regarded in the same light as the principal, and whatever he does pertaining to the matter in his charge will be deemed the act of his constituent. His concealment or his representation, even of a fact not known to his principal, is imputable to the latter;² so that when a negligent or fraudulent agent of

¹ *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Eames v. Home Ins. Co.*, 94 U. S. 621.

² [It is not true as a universal rule that knowledge of an agent is knowledge of the principal. The master of a vessel may know of its loss, while the owner in a distant land is insuring it, but the policy is not thereby affected, even though the master had had time enough to communicate the loss, but refrained on purpose. So the knowledge of the owner himself on board will not affect a policy taken out by his agent at home, if the owner could not communicate in time to save the company. *Genl. Interest Ins. Co. v. Ruggles*, 12 Wheat. 411-412. Where brokers employed to insure an overdue vessel, receiving word that it was

one who applies for insurance intervenes between him and an innocent insurer, the party who employs the agent must bear the consequences of the neglect or fraud, upon the principle, so familiar in all courts of justice, that when one of two innocent persons must suffer by the fraud or negligence or unauthorized act of a third, he who clothed the third with power to deceive or injure must be the one. If either party must suffer by the act of the agent, it must be the party whose agent he is.¹ The rule seems to be less strict in cases of other contracts.² ["When the insurer in issuing a policy deals with a party who remains in possession of the instrument after execution, and is alone entitled to recover the amount thereof, in case of loss, he is authorized to assume that such party has power to consent to such changes in it before breach as will inure to the benefit of the insured, and tend to perfect the validity of the contract."³ When A., who has received money on a policy, is sued by C., who claims to be the owner of the property that was insured, it is competent for him to prove that he was the agent of another who had an insurable interest in the subject-matter, though he had none himself.⁴ Where the same person is at once agent for the policy-holder and the company, the former is bound by a notice to the agent of the cancellation of his policy.⁵

lost, discontinued their negotiations and put the company into direct communication with the owners, who insured in that company, and also in another through other brokers, the knowledge of the brokers affected the owners as to the first company, for the negotiations were really all one, but did not affect them as to the other company. *Blackburn v. Vigors*, 12 App. Cas. 531; *Blackburn v. Haslam*, 21 Q. B. D. 144. Knowledge of the loss of the subject-matter of the insurance, before the issuance of the policy, by one who is not an agent of the assured for any purpose connected with procuring the insurance, will not affect the insured. *Clement v. Phoenix Ins. Co.*, 6 Blatch. 481, 485.]

¹ *Fitzherbert v. Mather*, 1 T. R. 12; *Nicoll v. American Ins. Co.*, 3 W. & M. (U. S. C. C.) 529; *Carpenter v. American Ins. Co.*, 1 Story (U. S. C. C.), 57; *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497; *Gladstone v. King*, 1 M. & S. 35; *Lynch v. Dunsford*, 14 East, 494; *Draper v. Charter Oak Ins. Co.*, 2 Allen (Mass.), 569.

² *Cornfoot v. Fowke*, 6 Mees. & Wels. 358; Lord Abinger, however, dissenting, in a very able opinion.

³ [*Martin v. Tradesmen's Ins. Co.*, 101 N. Y. 502.]

⁴ [*Newson v. Douglass*, 7 H. & J. (Md.) 417, 449.]

⁵ [*Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502, 507.]

[§ 122 A. **Ratification by the Assured.** One may insure in his own name the property of another without his previous authority, and it will inure to the party intended to be insured or protected, upon his subsequent adoption of it, even after a loss has occurred.¹ An insurance effected for the benefit of a third person, although without his authority or sanction, may be adopted by the *cestui que insurance*,² even after the loss, if within a reasonable time,³ or after payment of proceeds.⁴ One of five trustees can insure the trust property, and the others may subsequently ratify the contract.⁵ The ratification of an act of agency to be binding must be with full knowledge of all material facts.⁶ The acceptance by the assured of a policy, with the intent of holding it as binding on the company, binds him according to the terms expressed, and he cannot be permitted to plead ignorance of them.⁷]

§ 123. **Referees; Medical Examiners; Broker.** — Persons referred to for information are agents only to a limited extent. They are authorized in behalf of their principal to answer interrogatories, whether verbal or written, so far as it is agreed that they shall be questioned, and the principal is responsible if such referee does not answer correctly, but the referee is not authorized to volunteer information not asked for; and if he does this the principal is not responsible.⁸

Reference to the surgeon's report for answers to interrogatories about the health of the applicant converts the report

¹ [Miltenerger v. Beacom, 9 Pa. St. 198, 200.]

² [Durand v. Thouron, 1 Porter (Ala.), 238, 247.]

³ [Watkins v. Durand, 1 id. 251, 254.]

⁴ [Snow v. Carr, 61 Ala. 363, 370.]

⁵ [Insurance Co. v. Chase, 5 Wall. 509, 514.]

⁶ [Owings v. Hull, 9 Pet. 607, 629.]

⁷ [Monitor Ins. Co. v. Buffum, 115 Mass. 343, 345. In this case there was a recital in the policy that the agent of the insured had given a deposit note, and it was held that acceptance of the policy was a ratification of the agent's act in giving the note, although the insured was in fact ignorant of it.]

⁸ Swete v. Fairlie, 6 C. & P. 1, per Ld. Denman, C. J.; Huckman v. Fernie, 3 M. & W. 505; Rawlins v. Desborough, 2 M. & Rob. 328; Everett v. Desborough, 5 Bing. 503; Maynard v. Rhode, 1 C. & P. 360; Rose v. Star Ins. Co., 3 Bigelow Life & Acc. Ins. Cas. 346. See also Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282, 294.

into answers as if by the applicant, and any misrepresentation or concealment there is as fatal as, if by the applicant personally.¹ It behooves, however, all referees, so far as authorized, to answer carefully all such general questions, — as, for instance, whether there are any other circumstances which would affect the risk, or are important for the company to know, — as may be put to them; and if the person interrogated is in doubt whether a particular fact known to him is material or important, it is safest to communicate it, as his principal will be responsible for whatever, in fact, may be found by the jury to be material, without regard to his judgment upon that point.² But in *Wheeltón v. Hardisty*³ it was held that, when the policy contains no express condition that the insured shall be held responsible for the misrepresentations or concealments of the “life” or the referee, and is made on a declaration that the insured believes the statements of the “life” and the referee to be true, they are not his agents, and he is only responsible for the truth of his statement as to his belief, and not for their fraudulent misstatements. If he expressly stipulate for their truth, however, the assured is bound by the statements of the “life.”⁴ When the applicant is referred by the insurers to their medical examiner, it is that he may examine and report as to the life. His duty as medical examiner does not carry with it authority to advise the applicant how he should fill up his application, so as to bind the company.⁵ But a broker employed to effect a policy of insurance, or to procure its modification, must be regarded as the agent of the party who employs him, and his acts in that behalf bind his principal.⁶

¹ *Smith v. Ætna Life Ins. Co.*, 49 N. Y. 211. See also *post*, § 214.

² *Lindenau v. Desborough*, 8 B. & C. 586; s. c. 3 M. & R. 45. But see *post*, §§ 201–203.

³ 8 E. & B. 232. This case contains a very careful examination of the prior cases by both court and counsel, which it will be well to refer to. *Mutual Life Ins. Co. v. Wager*, 27 Barb. (N. Y.) 354.

⁴ *Forbes v. Edinburgh Life Assurance Co.*, 10 Ct. of Sess. Cas., First Series, 451.

⁵ *Flynn v. Equitable Life Ass. Soc.*, 67 N. Y. 500, reversing s. c. 7 Hun (N. Y.), 387.

⁶ *Standard Oil Co. v. Triumph Ins. Co.*, N. Y., 5 Ins. L. J. 594; *Union Ins. Co. v. Chipp*, 93 Ill. 96; *Continental Life Ins. Co. v. Goodall*, Cin. Superior

§ 124. **Duty of the Agent of the Insured.** — An agent having general authority to insure the property of his principal has no authority to effect an insurance in a mutual company whereby he makes his principal an insurer of others.¹ The agent employed to effect insurance, it scarcely need be said, is responsible to his principal for every negligence in the performance of his duties. That the undertaking was gratuitous is no defence, if it was actually entered upon;² though perhaps the breach of a mere gratuitous promise to undertake would not be actionable. So is he for neglect to make reasonable efforts to insure when it is his duty to obtain insurance if he can;³ and effecting insurance with irresponsible parties has been held to be negligence.⁴ The measure of damages in such case is the amount which the irresponsible insurers ought to have paid.⁵

[§ 124 A. **Whose Agent?** (*Agent of Company.*) — Where *A.* goes to *B.* to get insurance, and *B.*, not being able to place the whole amount in the companies he represents, goes to another insurance agent, *C.*, *B.* is not the agent of the assured in this negotiation, without his knowledge, so as to avoid the policy by his false statements.⁶ But when the assured filled out an application in Company *A.*, and gave it to *A.*'s agent to procure insurance in "any good company," and the agent procured the same in Company *B.*, it was held that he was in this transaction the assured's agent solely.⁷ The insurance agent cannot be considered in any sense as the agent of the insured in anything connected with issuing the policy.⁸ A clause in the policy declaring that the company will not be bound by the act of any agent, does not overcome the law which holds the company for the acts

Ct., 5 Big. Life & Acc. Ins. Cas. 422; *Marland v. Royal Ins. Co.*, 71 Pa. St. 393.

¹ *White v. Madison*, 26 N. Y. 117.

² *Wallace v. Tellfair*, 2 T. R. 188, n.; *Wilkinson v. Coverdale*, 1 Esp. 75.

³ *Smith v. Lascelles*, 2 T. R. 187; *Smith v. Cologan*, 2 T. R. 188, n. (*a*).

⁴ *Hurrell v. Bullard*, 3 F. & F. 445.

⁵ *Smith v. Price*, 2 F. & F. 748.

⁶ [*McGraw v. Germania Fire Ins. Co.*, 54 Mich. 146.]

⁷ [*Fame Ins. Co. v. Mann*, 4 Ill. App. 485, 492.]

⁸ [*Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571.]

of agents within the scope of their authority.¹ (a) The *facts* of the case must determine for whom the person was acting.² In Iowa it is provided by statute that one soliciting insurance or procuring applications shall be deemed the agent of the company, no matter what the policy or application may say to the contrary, wherefore no agreement can convert him into the agent of the assured.³

(*Agent of Insured.*) — A broker who solicits insurance, and then procures a policy to be issued by the insurer, is not the agent of the company merely by such facts.⁴ Where A. obtains a policy through a broker B., who acts through other brokers, finally in the chain coming to an insurance agent, B. is the agent of A., and payment of the premium to him or to any of the line, except the insurance agent, is not payment to the company.⁵ An insurance agent agreed with A. to look after his risks in the company he represented, and in others, and reported lists to him showing the amount of his insurances therein, and giving him a receipt for money advanced to pay premiums. These lists were held inadmissible in an action by A. against the agent's company, to show any recognition of the policy.⁶

§ 125. **Agent must be disinterested.** — It is, of course, elementary law that an agent must not be personally interested adversely to his principal, so that an agent for receiv-

¹ [Insurance Co. v. Lee, 73 Tex. 641.]

² [Smith v. Home Ins. Co., 47 Hun, 30, 37; Deitz v. Ins. Co., 31 W. Va. 851; Pierce v. The People, 106 Ill. 11; North British, &c. Ins. Co. v. Crutchfield, 108 Ind. 518; Sullivan v. Phenix Ins. Co., 34 Kans. 170; Kansal v. Minn., &c. Fire Ass., 31 Minn. 17. In Atlantic Ins. Co. v. Carlin, 58 Md. 336, the facts were held to bring the case within the true scope of the clause, and one who received an application for renewal and remitted the premium, was held the agent of the insured. Insurance Co. v. Cusick, 109 Pa. St. 157; Nassauer v. Insurance Co., id. 507.]

³ [Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304; see *infra*, § 125, n. (b) *ad finem*.]

⁴ [Kings Co. Fire Ins. Co. v. Swigert, 11 Brad. 590.]

⁵ [Pottsville Mut. Fire Ins. Co. v. Minnequa Springs Imp. Co., 100 Pa. St. 137.]

⁶ [Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502, 506.]

(a) As to the effect of the agency the insured, see *Knights of Pythias v. Withers*, 177 U. S. 260.
clause in the policy, making the person negotiating the insurance, the agent of

ing applications ceases to be an agent so long as he acts in a matter in which his personal interest is concerned. If he applies for insurance on his own property, as to that property he is no agent of the company. (a) He cannot, by the familiar rule of law, as agent, represent antagonistic interests.¹ He cannot be the agent of both parties in the same transaction. If he so act, the contract may be avoided by either party.² (b) It may happen that during the negotia-

¹ *Bentley v. Columbia Ins. Co.*, 17 N. Y. 421, affirming s. c. 19 Barb. (N. Y.) 595; *New York Central Ins. Co. v. National Protection Ins. Co.*, 4 Kern. (N. Y.) 85, reversing s. c. 20 Barb. (N. Y.) 468; *Utica Ins. Co. v. Toledo Ins. Co.*, 17 Barb. (N. Y.) 132. [An agent making an application on his own property, directly or indirectly, for his own benefit is acting for himself, and is not the agent of the company in the transaction. *Spare v. Home Mut. Ins. Co.*, 19 Fed. Rep. 14 (Or.), 1884. He cannot effect insurance in his company on property of which he is part owner, without the knowledge of the company, even though it could be shown that his relation thereto was not material to the risk. The ground of the rule is public policy. *Ritt v. Washington Mut. & Fire Ins. Co.*, 41 Barb. 353, 357. An agent cannot bind his principal in a contract with himself. A parol contract between A. and B. for the renewal of a policy on partnership property of A. and B., A. being agent of the company, must be approved by the insurer, before it will bind him. *Glens Falls Ins. Co. v. Hopkins*, 16 Brad. 220. The secretary of a company cannot issue insurance to himself, and such a contract will not be rendered valid by constructive notice to the company by reason of its being placed upon the files. Actual knowledge of the facts is necessary to its ratification. *Pratt v. Dwelling-House Mut. Fire Ins. Co.*, 53 Hun, 101.]

² *Ibid.* [The law will not allow a person to act as agent for both insurer and insured, and if he does so act either party may avoid the contract. *People's Ins. Co. v. Paddon*, 8 Brad. 447.]

(a) See *infra*, § 137, and note.

(b) An insurance agent cannot act as agent for both the insurer and the insured without the former's knowledge and consent, when such double agency will give rise to any conflict of duties; and he is not individually liable upon his contract "as agent," to keep property insured in his company. *Ramspeck v. Pattillo*, 104 Ga. 772; see *Teutonia Ins. Co. v. Ewing*, 90 Cal. 217. Such an agent, when directed to cancel, or to reinsure part of a risk, cannot, in a matter thus involving discretion, act for both companies as to the reinsurance. *Empire State Ins. Co. v. Am. Central Ins. Co.*, 138 N. Y. 446. When such

an agent, not being limited in his authority, undertakes to prepare applications and take down answers, he is deemed to be acting for the insurer. *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 531; *U. S. Life Ins. Co. v. Smith*, 92 Fed. Rep. 503, 503; *supra*, § 124 A; *Com'th Mut. F. Ins. Co. v. Knabe Co.*, 171 Mass. 265. As stated *infra*, § 500, it is often a question of fact, or one of mixed fact and law, for the jury as to each act in a negotiation whether the agent is acting for the company or for the insured. See *Westfield Cigar Co. v. Ins. Cos.*, 169 Mass. 382; *Firemen's Ins. Co. v. Horton*, 170 Ill. 258; *Lumbermen's Mut. Ins. Co. v.*

tions, the agent of the insurers in certain particulars may, in certain other particulars, be empowered by the insured to act for him, so that the same person becomes now the agent of one and now the agent of the other contracting party.¹

§ 126. *Agent's Authority, what it appears to be.* — The authority of an agent must be determined by the nature of his business, and is *prima facie* co-extensive with its requirements.² [An agent authorized to issue policies binds the company by all waivers, representations, or other acts within the scope of his business unless the insured has notice of a limitation of his powers.³ The question always is, not what power the agent did in fact possess, but what power the company held him out to the public as possessing.⁴] His power cannot be limited by special private

¹ See *post*, § 500.

² *Post*, § 144; *Imperial Fire Ins. Co. v. Murray*, 73 Pa. St. 13; *Wass v. Maine Mut. Mar. Ins. Co.*, 61 Me. 537; *Lycoming Ins. Co. v. Woodworth*, 83 Pa. St. 223; *Mentz v. Lancaster Fire Ins. Co.*, 79 Pa. St. 475; *Putnam v. Home Ins. Co.*, 123 Mass. 324; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345.

³ [*Ins. Co. v. Barnes*, 41 Kans. 161 (agent misstated title in the application, being informed of the facts); *Insurance Co. v. Hogue*, 41 Kans. 524 (renewal in unauthorized manner); *Phoenix Ins. Co. v. Spiers*, 87 Ky. 286.]

⁴ [*Eclectic Life Ins. Co. v. Fahrenkrug*, 68 Ill. 463, 467.]

Bell, 166 Ill. 400. When an insurance broker solicits or is applied to for insurance, he acts as the applicant's agent in selecting the insurers, his authority ceasing when the policy is obtained; and if asked by the insured to obtain a renewal, and the insurer sends him a renewal receipt, expecting him to collect the premium on its delivery to the insured, the premium is paid when the insured pays it to him, though the insurer never receives it. *Ibid.*; *American Fire Ins. Co. v. Brooks*, 83 Md. 22; *Michigan Pipe Co. v. Michigan F. & M. Co.*, 92 Mich. 482; 20 L. R. A. 277, and note; *Improved-Match Co. v. Michigan Mut. F. Ins. Co. (Mich.)*, 80 N. W. 1088; *Croft v. Hanover F. Ins. Co.*, 40 W. Va. 508; *Goldin v. Northern Ass. Co.*, 46 Minn. 471; *East Texas F. Ins. Co. v. Blum*, 76 Texas, 653; *Phoenix Ins. v. Spiers*, 87 Ky. 285, 297; *British America Ass. Co. v.*

Cooper, 6 Col. App. 25; *Buick v. Mechanics' Ins. Co.*, 103 Mich. 75; *British Ins. Co. v. Lambert*, 26 Oregon, 198; *Sellers v. Commercial F. Ins. Co.*, 105 Ala. 282; *McGonigle v. Susquehanna Mut. F. Ins. Co.*, 168 Penn. St. 1; *Fromherz v. Yankton F. Ins. Co.*, 7 So. Dak. 187; *Kansas Farmers' F. Ins. Co. v. Saindon*, 52 Kansas, 486; *Davis v. Aetna Mut. F. Ins. Co.*, 67 N. H. 335. Upon the Iowa statute of March 31, 1880, making those who solicit or procure insurance the soliciting agent of the company which issues a policy on such application, or a renewal thereof, anything in the application or policy to the contrary notwithstanding, see *Continental L. Ins. Co. v. Chamberlain*, 132 U. S. 304, 309; *Schoep v. Bankers' Alliance Ins. Co.*, 104 Iowa, 354. In Wisconsin, see *Stehlick v. Milwaukee Mechanics' Ins. Co.*, 87 Wis. 322.

instructions, unless the insured has notice, or there is something in the nature of the business, or the circumstances of the case, to indicate that the agent is acting under such special instructions.¹(a) A provision in the

¹ *United States Life Ins. Co. v. Advance Co.*, 80 Ill. 549; *Miller v. Phoenix Ins. Co.*, 27 Iowa, 203; *Southern Life Ins. Co. v. McCain*, 96 U. S. 84. [Secret or unknown instructions do not affect a person dealing with an agent within the apparent scope of his authority. *Rivara v. Queen's Ins. Co.*, 62 Miss. 720; *Commercial Union Ass. Co. v. State*, 113 Ind. 331; *Ruggles v. Am. Cent. Ins. Co.*, 114 N. Y. 415, 421, 1889; *Breckinridge v. Amer. Cent. Ins. Co.*, 87 Mo. 62. Instructions to the agent not communicated to the insured do not affect him. *Queen Ins. Co. v. Young*, 86 Ala. 424.]

(a) A limitation upon the authority of an agent of an insurance company, by private instructions given to him by the officers of the company, cannot bind a person with whom he makes an oral contract of insurance, if such person has no knowledge of the limitation. *Brown v. Franklin Mutual Fire Ins. Co.*, 165 Mass. 565. See *Parker & Young Manuf. Co. v. Exchange F. Ins. Co.*, 166 Mass. 484.

The authority of the agent to make the contract of insurance enables him, without the aid of the courts, to correct a policy by inserting afterwards property intended to be included, but omitted by mistake: *Taylor v. State Ins. Co.*, 98 Iowa, 521; or to assent to an assignment of the policy to cover a mortgage. *German Ins. Co. v. Penrod*, 35 Neb. 273. With respect to waiver of the breach of a condition in a policy the most liberal view is that the agent's authority is co-extensive with the business intrusted to his care. *Weed v. London & L F. Ins. Co.*, 116 N. Y. 106; *German Ins. Co. v. Gray*, 43 Kans. 497. If the agent is empowered to prepare, receive, and transmit applications, and to receive payment of the premium, his knowledge acquired in so doing, and his representations then made to the insured, bind the insurer. *Home F. Ins. Co. v. Gurney*, 56 Neb. 306; *Perry v. Dwelling-House Ins. Co.*, 67 N. H. 291; *McDonald v. Phila. F. Ass'n*, 93 Wis. 348; *Met'n L. Ins. Co. v. Mul-*

leady (Ky.), 29 Ins. L. J. 164. But he cannot insure, or waive policy stipulations, so as to bind the company, when it is clear that his acts exceed the power it has conferred upon him. *Farmers' & M. Ins. Co. v. Graham*, 50 Neb. 818; *Rahr v. Manchester F. Ass. Co.*, 93 Wis. 355; *Ward v. Met'n L. Ins. Co.*, 66 Conn. 227; *Sawyer v. Equitable Acc. Ins. Co.*, 42 Fed. Rep. 30. The insured is bound, in the absence of fraud, to know the measure of an agent's authority. *Conway v. Phenix M. L. Ins. Co.*, 140 N. Y. 79; *Murphy v. Royal Ins. Co. (La.)*, 29 Ins. L. J. 210. As to an agent's power to waive premiums and allow credit, see *Smith v. New England Mut. L. Ins. Co.*, 63 Fed. Rep. 769; *Smith v. Provident Sav. L. Ass. Society*, 65 id. 765; *Moore v. Rockford Ins. Co.*, 90 Iowa, 636; *Arthurholt v. Susquehanna Mut. F. Ins. Co.*, 159 Penn. St. 1; *Wilkins v. State Ins. Co.*, 43 Minn. 177. As to the authority of insurance agents, see also *Paine v. Pacific M. L. Ins. Co.*, 51 Fed. Rep. 689; *Mutual B. L. Ins. Co. v. Robison*, 58 id. 723; *Harrison v. Hartford F. Ins. Co.*, 59 id. 732; *Henderson v. Travelers' Ins. Co.*, 65 id. 438; *Potter v. Phenix Ins. Co.*, 63 id. 382; *Parker v. Rochester G. Ins. Co.*, 162 Mass. 479; *Porter v. U. S. L. Ins. Co.*, 160 Mass. 183; *Baker v. Commercial U. Ass. Co.*, id. 358; *Croft v. Hanover F. Ins. Co.*, 40 W. Va. 508; *Commercial Fire Ins. Co. v. Morris*, 105 Ala. 498; *Fidelity & C. Ins.*

policy that agents are only authorized to collect renewal premiums upon receipts furnished and signed by the president and secretary, is notice of such limitation of the agents' powers.¹ So is a provision in the policy that they cannot waive any of its conditions.² But notices printed on the back of a policy, that payment to an agent will not be valid without the production of a receipt, is not.³ The agent's act must appear to be an act in furtherance of the business of his principal. If he is known to have charge of a special branch of his principal's business, his powers can only be exercised in the prosecution of that branch. An agent to make contracts has larger powers than an agent to receive applications to be forwarded to his principal. Stock companies have larger powers than mutual companies. So with their agents. A general agent,⁴ in the strict legal sense, is one who has all the powers of his principal as to the business in which he is engaged, — an extent of authority not often conferred in insurance. In that business an agent is termed a general agent rather with reference to the geographical extent of his authority, in contradistinction to a local agent, who may have original powers, though exercising them within more restricted limits; and the general agent may appoint local and sub-agents, which a local agent cannot.⁵ (a)

¹ *Merserau v. Phoenix Mut. Life Ins. Co.*, 66 N. Y. 274; *Catoir v. Am. Life Ins., &c. Co.*, 33 N. J. 487; *post*, § 138.

² *Greene v. Lycoming Fire Ins. Co. (Pa.)*, 9 Ins. L. J. 811; *Clevenger v. Mut. Life Ins. Co. (Dak.)*, 9 Ins. L. J. 129.

³ *McNeilly v. Continental Life Ins. Co.*, 66 N. Y. 23.

⁴ [An indorsement on the policies "D. C. Heminway, agent," there being no intimation of restriction, entitles the insured to regard H. as a general agent. *Fire Ins. Co. v. Building Ass.*, 43 N. J. 652. "Where a power is general, the agent may do anything to bind his principal which is within the scope of his authority. But if it be special, everything is void if he does not act in strict conformity to his authority." *Allen v. Ogden*, 1 Wash. 174, 176.]

⁵ *Rossiter v. Trafalgar Ass. Ass'n*, 27 Beav. 377.

Co. v. Teter, 136 Ind. 672; *Squire v. trout (Berks Co., Penn.)*, 21 Ins. L. J. Hanover F. Ins. Co., 162 N. Y. 552; 1055.

Hamm Realty Co. v. New Hampshire F. Ins. Co. (Minn.), 83 N. W. 41. As to the liability of an insurance agent to his principal for failure to obey instructions, see *Sun Fire Office v. Ermen-*

(a) A local or special agent, who has no actual authority to enter into a contract of insurance, cannot delegate such a power to a sub-agent: *Stewart v. Helvetia Fire Ins. Co.*, 102 Cal. 218.

But there seems to be no very well defined distinction between the powers of general agents, local agents, and sub-agents, and therefore they may become, in any case, a question of fact for the jury.¹ A general agent of a foreign company, appointed under a statute, to receive service of process, except as to such matters as facilitate suits against the principal, has no larger powers than are conferred by the common law of agency.² Nor does such an agency imply the authority to intervene in the negotiations for a policy.³

A person authorized to accept risks, to agree upon and

¹ *Markey v. Mut. Benefit Life Ins. Co.*, 103 Mass. 78; *Kolgers v. Guard. Life Ins. Co.*, 10 Abb. Pr. R. N. s. 176. [When an agency is shown, the law does not presume it to be either general or special; that is a question of fact for the jury. *Dickinson County v. Miss. Valley Ins. Co.*, 41 Iowa, 286, 290, 1875.]

² *Ibid.*

³ *Whitcomb v. Phoenix Life Ins. Co.*, C. Ct. (Mass.), 8 Ins. L. J. 624. But see *post*, § 151; *Queen's Ins. Co. v. Harris* (Pa.), 5 Ins. L. J. 558.

O'Brien v. New Zealand Ins. Co., 108 Cal. 227; *Home F. Ins. Co. v. Garbacz*, 48 Neb. 827; *Teutonia Ins. Co. v. Howell* (Ky.), 54 S. W. 852; or bind the insurer by his conduct, representations, or admissions. *Ibid.*; *Phoenix Ins. Co. v. Copeland*, 90 Ala. 386. The clerk of such an agent cannot waive forfeitures. *German American Ins. Co. v. Humphrey*, 62 Ark. 348. See *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176; *Harding v. Norwich Union F. Ins. Society*, 10 So. Dak. 64. If a local agent has apparent authority by custom, or otherwise, to receive proofs of loss, a delivery to him constitutes a delivery to the company, even if he had not authority from the nature of his agency to receive them, or if, in the absence of custom, a delivery to him under the circumstances would not have been a reasonable mode of sending the proofs of loss to the company. See *Bishop v. Eaton*, 161 Mass. 496, 500; *Wheeler v. Watertown Ins. Co.*, 131 Mass. 1; *Harnden v. Milwaukee M. Ins. Co.*, 164 Mass. 382; *Arff v. Star Ins. Co.*, 125 N. Y. 57; *Snyder v. Dwelling-House Ins. Co.*, 59 N. J. L. 18, 544; *Nickell v. Phoenix Ins. Co.*,

144 Mo. 420; *Phenix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb. 21; *Burlington Ins. Co. v. Kennerly*, 60 Ark. 532; *Harrison v. Hartford F. Ins. Co.*, 59 Fed. Rep. 732; *Loeb v. American Central Ins. Co.*, 99 Mo. 50. He may also waive a condition that the waiver of proofs of loss be indorsed. *O'Leary v. German-American Ins. Co.*, 100 Iowa, 390. And he may at the request of the insured strike out the iron-safe clause. *Parsons v. Knoxville F. Ins. Co.*, 132 Mo. 583; *Georgia Home Ins. Co. v. Allen* (Ala.), 24 So. 399. But under a standard policy, like that of Michigan, which provides that an agent can only waive its provisions by indorsement, the agent cannot verbally waive proofs of loss. *Wadhams v. Western Ass. Co.*, 117 Mich. 514. An agent's consent not indorsed on the policy, when such indorsement is required thereby, is void. *Quinlan v. Providence Washington Ins. Co.*, 133 N. Y. 356. But see *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63; *Miller v. Scottish Union Ins. Co.*, 101 Mich. 49; *German Ins. Co. v. Rounds*, 35 Neb. 752; *St. Paul F. & M. Ins. Co. v. Parsons*, 47 Minn. 352.

settle the terms of insurance, and to carry them into effect by issuing and renewing policies, must be regarded as the general agent of the company, pending negotiations.¹ And if he has an appointment as "agent and surveyor," he will be presumed, in the absence of restriction, to have all the powers incident to both capacities.² But it is held in Massachusetts that such an agent has not authority to waive proofs of loss.³ And the possession of blank policies and renewal receipts, signed by the president and secretary, is evidence of such general agency.⁴ Authority to do a particular act carries with it the authority to make available the ordinary means by which the act may be accomplished. If the president of an insurance company be authorized by the by-laws to "adjust and pay losses," he may indorse notes held by the company and deliver them in payment.⁵ And though by the charter or by-laws the powers of officers may be restricted, they may bind the company though they exceed their powers, especially if such excess is known and acquiesced in.⁶

A secretary, authorized to answer all "communications in behalf of the company," may bind the company by his admissions in such correspondence as to the sufficiency of a notice of loss.⁷ So authority to settle the terms upon which a change in the risk may be made carries with it the right to waive a forfeiture by reason of a change in the risk;⁸ and special authority to settle for a loss carries with it the right

¹ *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 6, affirming s. c. 61 Barb. (N. Y.) 335; *post*, §§ 129, 138.

² *Lycoming Fire Ins. Co. v. Woodworth*, 83 Pa. St. 223.

³ *Lohmes v. Ins. Co. of N. A.*, 121 Mass. 439.

⁴ *Carroll v. Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 292. [If a foreign company appoints A. and B. as local agents, and supplies them with blank policies signed by the company, and which they may fill up and countersign, they are its general agents. *Continental Ins. Co. v. Ruckman*, 127 Ill. 364.]

⁵ *Baker v. Cotter*, 45 Me. 236.

⁶ *Ibid.* Agents may also act as effectually by clerks as by themselves personally. *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117; *Eclectic Ins. Co. v. Fahrenkrug*, 68 Ill. 463; *Continental Life Ins. Co. v. Goodall*, Cincinnati Supr Ct., 5 Big. Life & Acc. Ins. Cas. 422; *post*, § 155.

⁷ *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 32.

⁸ *North Berwick Co. v. New England Fire & Mar. Ins. Co.*, 52 Me. 336.

to extend the time limited by the conditions of the policy, within which the statement of the loss is to be made.¹ But authority to take applications and surveys, to receive premiums and give certificates of insurance, subject to the approval of the directors, does not give authority to make a contract not subject to such approval.² It is to be observed, however, that the decided inclination of the courts is to extend, rather than restrict, the power of agents as to all that they may say or do touching the contract.³ (a) Authority, however, to two persons to act as "agent" terminates with the death of either.⁴

[§ 126 A. Agents authorized to take applications for insurance are acting within the scope of their authority in everything which they do, which may be necessary to complete such applications.⁵ An agent cannot effect insurance in another company to protect his own company on property covered by it, without *special* authority, and where the same person is agent for both companies, such conduct is a breach of trust.⁶ One who has authority to take applications, receive and receipt for premiums, forward them, receive policies from the company, and deliver them after countersigning them, has no power to bind the company by a contract of insurance in any other way than by delivery of a policy issued by the company.⁷]

¹ Lycoming County Mut. Ins. Co. v. Schollenberger, 44 Pa. St. 259.

² Insurance Co. v. Johnson, 23 Pa. St. 72; Morse v. St. Paul's Fire & Mar. Ins. Co., 21 Minn. 407.

³ Union Mut. Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 222. And see *post*, § 509.

⁴ Hartford Ins. Co. v. Wilcox, 57 Ill. 180; Martine v. International Life Ins. Co., 62 Barb. (N. Y.) 181; affirmed, 53 N. Y. 339.

⁵ [Combs v. Hannibal Savings & Ins. Co., 43 Mo. 148, 152.]

⁶ [London, &c. Fire Ins. Co. v. Turnbull, 86 Ky. 230.]

⁷ [Armstrong v. State Ins. Co., 61 Iowa, 212.]

(a) Neither the agency nor the extent of its powers can be established by the declarations of the supposed agent without the knowledge of his principal; but the agent may prove his agency and powers by his own testimony and oath. Van Sickle v. Keith, 88 Iowa, 9; O'Leary v. German-American Ins. Co., 100 id. 390; Dickerman v. Quincy Mut. F. Ins. Co., 67 Vt. 609; Eaton v. Granite State Provident Ass'n, 89 Maine, 58.

§ 127. **Agents of Stock and Mutual Companies.** — In general, it may be said that the agents and officers of companies organized with a capital stock divided into shares have greater powers in determining what shall be the terms of the contract and in waiving a compliance with its stipulations, than those of companies organized on the mutual principle, in which the by-laws are made to fix and regulate, by the same stipulations in every policy, the rights of all the assured alike.¹ And it will be seen as we proceed, that while some courts, as those of Massachusetts and New Jersey, with a view to promote the safety and efficiency of such companies, have confined the powers of the agents and officers of mutual insurance companies strictly within the limits marked out by their charters and by-laws as interpreted in the light of the purposes for which such companies were established, others, looking rather to the protection and safety of those who are dealing with such officers and agents, have shown a perhaps increasing inclination to give a liberal construction to those provisions of the charters and by-laws which tend to limit such powers.

§ 128. **May bind the Company by Parol Contract.** — It has been at length settled by numerous decisions, as we have already seen,² that the officers of a company may make a valid contract of insurance even by parol, and may bind the company which they represent by an agreement to insure as effectually as by a policy issued in due form, even where the charter of the company requires that every contract, bargain, policy, or other agreement shall be in writing, signed by the president, and sealed with the corporate seal. But the exercise of such powers will not bind the company unless clearly within the scope of the agent's authority and of the powers of the company. While a parol agreement to issue a policy would be valid, a merely collateral promise or representation which does not involve the execution of a policy would not be; as is shown by the following case. The plaintiff, though a broker, applied to the defendants for insurance

¹ *Brewer v. Chelsea Mut. Fire Ins. Co.*, 14 Gray (Mass.), 203.

² *Ante*, § 14 *et seq.*

to a definite amount, and was informed that it would be taken. The defendants subsequently sent to the broker their own policy for a part, and the policies of three other companies for the residue, executed by an agent for the latter companies. The broker on receiving the policies wrote, in the absence of his principals, to the defendants, to say that he doubted whether the three latter policies would be accepted, alleging as a reason that the agent had not a good reputation for settling losses, and adding, "I don't know whether it is your custom to guarantee the offices you insure in or not. If you do, I may prevail on" the plaintiff "to hold the policies." The secretary of the defendants, in reply, wrote: "In handing the policies" to the plaintiff, "you can say that, if the boat is not insured in offices satisfactory to him, we will have them cancelled; but, though they are not reinsurances, yet, in case of loss, we will feel ourselves bound for a satisfactory adjustment. We deem the companies good, and if any parties can settle with them, we can." On the faith of this letter the transaction was closed; and one of the substituted companies having failed, and a loss having occurred, a special action was brought against the defendants, which resulted unfavorably to the plaintiff, on the ground that such a contract was not within the scope of the secretary's authority, because not strictly within the scope of the powers granted to the corporation.¹

§ 129. **General Agent of Stock Company, pending Negotiations.** — The power of an agent of a stock company held out by the company to the public as such, and intrusted with policies in blank, signed by the president and secretary, and to be filled up, indorsed, countersigned, and issued by the agent, is plenary as to the amount and nature of the risk, the rate of premium, and generally as to the terms and conditions of the contract; and he may make such erasures, explanations, memoranda, and indorsements, and give such advice and information, modifying or limiting the general provisions of the policy, and even inconsistent therewith, as

¹ *Constant v. The Allegheny Ins. Co.*, 3 Wall. Jr. (U. S. C. C.) 313; s. c. 1 Am. Law Reg. N. s. 116.

in his discretion seems proper, before the policy is delivered and accepted, or even after, if this be his habit known to the office.¹ Having the authority to make an original contract upon terms similar to those contained in the policies, signed in blank, intrusted to him, and being clothed with such general powers, he may before the delivery modify the terms and conditions so as to make the company liable for loss by special cause, from liability for which the general printed terms of the policy would exempt them, and allow the insured to keep articles, use modes of heating, and carry on branches of manufacture prohibited by the printed terms of the policy, without risk of forfeiture. So he may bind them by a parol contract to renew from time to time,² and by a parol contract to issue a policy.³ He may also insert by memorandum or indorsement a description of the property insured inconsistent with the description of the same contained in the application, and such change will be effectual to protect the insured, although the policy itself provides that all the conditions named in the survey or application are to be fully complied with; and such survey and description shall be deemed to be a part of the policy, and a warranty on the part of the insured.⁴ These acts of the agent, it is to be observed, are such as are done in the process of negotiation,⁵ and while the contract is yet incomplete. When once the contract is perfected, the agent's power with

¹ *Gloucester Manuf. Co. v. Howard Fire Ins. Co.*, 5 Gray (Mass.), 498; *Brockelbank v. Sugrue*, 5 C. & P. 21; *Warner v. Peoria Mar. & Fire Ins. Co.*, 14 Wis. 318; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; *ante*, § 126; *Rowley v. Empire Fire Ins. Co.*, 36 N. Y. 550; *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465; *Combs v. Hannibal Ins. Co.*, 43 Mo. 148; *Moliere v. Penn Fire Ins. Co.*, 5 Rawle (Pa.), 342; *Benison v. Ottawa Agr. Ins. Co.*, 42 U. C. (Q. B.) 282; *Marcus v. St. Louis Ins. Co.*, 68 N. Y. 625. But see *Hartford Fire Ins. Co. v. Webster*, 69 Ill. 392. [A general agent has power to modify or cancel a contract which he has the power to make. *Anderson v. Coonley*, 21 Wend. 279, 280. When by mistake the policy was made payable to A., but by indorsement thereon, the secretary changed it to B., the real party applicant, it was held a valid contract with B. *Solmes v. Rutgers Fire Ins. Co.*, 3 Keyes, 416, 418.]

² *Baubie v. Aetna Ins. Co.*, 2 Dill. C. Ct. 156.

³ *Angell v. Hartford Fire Ins. Co.*, 59 N. Y. 171.

⁴ See cases cited, n. 1, p. 225.

⁵ *Post*, § 144.

reference thereto is in many respects exhausted;¹ and his power to deal with facts and circumstances arising after the completion of the contract is by no means so extensive.² An agent authorized to take risks and issue policies cannot, for instance, waive preliminary proofs.³

§ 130. **Same Subject; Authority to insure Property located beyond his District.** — And such a general agent, authorized to effect insurance "for a particular city and its vicinity," may nevertheless insure property located beyond the geographical limits of his agency, and within those of another agent. Private instructions restricting his agency cannot affect the relations between the insured and the insurers. Besides, such a restriction would seem to apply rather to the sphere within which the agent should act, than to the property which, while acting within prescribed limits, he might insure, although located beyond those limits.⁴ He may also bind his principal, even though he act contrary to his instructions, if what he actually does is fairly deducible from his authority as general agent, the instructions which he violated not being known to the insured. If such agent fails in his duty to his principal it is no fault of the insured.⁵ And the delivery by such agent of a policy to which the insured is fairly entitled in execution of a subsisting agreement is good, although before its delivery the insurers notify the insured that they will not be bound by it, and that they have revoked the authority of the agent to act for them.⁶ Notice to him that gunpowder is at the time of insurance, and will thereafter be, kept on the premises for sale, is a notice to the company; and if after such notice a policy be issued containing a condition that if gunpowder is so kept,

¹ *Healey v. Imperial Fire Ins. Co.*, 5 Nev. 268.

² See *post*, §§ 131, 138.

³ *Lohnes v. Insurance Co.*, 121 Mass. 439. See also *Wilson v. Genesee Mut. Ins. Co.*, 14 N. Y. 418, reversing s. c. 16 Barb. (N. Y.) 511; *Bush v. Westchester Fire Ins. Co.*, 63 N. Y. 531; *Reynolds v. Continental Ins. Co.*, 36 Mich. 131.

⁴ *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18.

⁵ *Gloucester Manuf. Co. v. Howard Fire Ins. Co.*, 5 Gray (Mass.), 497.

⁶ *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517.

without written permission in the policy, the policy shall be void, the condition is waived.¹

[§ 130 A. **Alteration of Policy.** — When the original policy was rendered void by an act of the agent, who with good intentions, but without authority, altered the policy to make it correspond to the agreement, and a loss thereafter occurred, the company were held bound by the first intentions of the parties.² An agent who forwards the application to the company and whose power is therefore manifestly limited to delivery of the policy and receipt of the premium, cannot rightly be supposed to have power to alter the contract by the insertion of a clause agreeing to pay the loss to another than the assured. An agent undertaking to procure a change in a policy acts for the insured.³ A clause inserted in a policy without authority may be ratified by the company.⁴]

§ 131. **Same Subject; Opinions.** — Mistakes of omission or commission, made by such an agent in the description of the property insured or otherwise, he knowing or having the means of knowing the truth, and not being misled by the insured, cannot be availed of by the company to the prejudice of the latter.⁵ Though it has been held that the agent cannot give a partner who insures the partnership property in his own name only, under the belief, induced by the expressed opinion of the agent to that effect, that such insurance would cover the copartnership interest, a claim against the company for more than his own interest,⁶ it has been distinctly held to the contrary in several well-considered cases.⁷ And where one party who owns a building joins

¹ *Peoria Mar. & Fire Ins. Co. v. Hall*, 12 Mich. 202; *post*, § 132; *Manhattan Fire Ins. Co. v. Weill*, 23 Grat. (Va.) 389; *Mobile, &c. Ins. Co. v. Miller*, 58 Ga. 420.

² [*Bunten v. Orient Mut. Ins. Co.*, 2 Keyes, 667, 669.]

³ [*Duluth National Bank v. Knoxville Fire Ins. Co.*, 85 Tenn. 76, 85.]

⁴ [*Andrews v. Aetna Life Ins. Co.*, 92 N. Y. 596.]

⁵ *Ayres v. Home Ins. Co.*, 21 Iowa, 185; *Emery v. Piscataqua Fire & Mar. Ins. Co.*, 52 Me. 322; *New England Fire & Mar. Ins. Co. v. Schettler*, 38 Ill. 166; *Aetna Live-Stock, &c. Ins. Co. v. Olmstead*, 21 Mich. 246.

⁶ *Peoria Mar. & Fire Ins. Co. v. Hall*, 12 Mich. 202.

⁷ *Manhattan Ins. Co. v. Webster*, 9 P. F. Smith (Pa.), 227; *Anson v. Winnesheik Ins. Co.*, 23 Iowa, 84. See also *Keith v. Globe Ins. Co.*, 52 Ill. 503; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213, 222.

with another party who owns the personal property within the building, in an application, which is filled up and forwarded by the agent of the company to whom all the facts are known, and a policy is issued purporting to insure the parties as joint owners of the real and personal estate, the insurers will be estopped to deny that the title is a joint one.¹ So if the general agent makes a mistake as to the character of the insurable interest of the applicant, the facts being correctly stated to him, and sets it down as an absolute, instead of a qualified, interest, which it really is, the company is estopped to deny that the interest is truly stated.² So if the agent express the opinion that the annual premium will fall due on a certain day,³ or that it is not necessary to state that he has had sunstroke,⁴ or that certain outstanding judgments do not amount to an incumbrance, — such errors of opinion will be imputable to the company; and a statement that there is no incumbrance will not avoid the policy, notwithstanding the policy provides that if the agent of the company assumes to violate any of its conditions, such violation shall be construed to be the act of the insured, and shall render void the policy.⁵ So, if

¹ *Peck v. New London Co. Mut. Fire Ins. Co.*, 22 Conn. 575.

² *Atlantic Ins. Co. v. Wright*, 22 Ill. 462. See also *Ashford v. Victoria Mut. Fire Ins. Co.*, 20 U. C. (C. P.) 434. Though the agent's authority be limited to soliciting and forwarding applications, this authority implies the right to do whatever may be necessary, by way of suggestion in matters of description or otherwise, to perfect it. *Combs v. Hannibal Ins. Co.*, 43 Mo. 148.

³ *Campbell v. International Life Ass. Soc.*, 4 Bosw. (N. Y.) Superior Ct. 298; *post*, § 134.

⁴ *Boos v. World Mut. Life Ins. Co.*, 6 T. & C. (N. Y.) 364; s. c. 64 N. Y. 236.

⁵ "If," said Mr. Chief Justice Woodward, in *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331, "the agent returned that there were no incumbrances, when he had been informed that there were judgments and a lease, he may have violated the 'conditions'; but no company has a right to select and send out agents to solicit patronage and business for its benefit, and then to saddle their blunders upon its customers. If the assured combine with the agent to cheat the company, we protect the company (referring to *Smith v. Ins. Co.*, *post*, § 149); but if the assured has covenanted for nothing, and has been guilty of no misrepresentation, concealment, or fraud, the company had better pay his loss, than to attempt to make him responsible for the blunders of their agent." And to the suggestion that, the assured being a member of a mutual insurance company, the agent was his agent, the learned judge replied: "The charters of these mutual

the agent express the opinion that an accidental omission of which he is informed will make no difference.¹

§ 132. **Agent's Knowledge, Knowledge of Principal.** — Facts material to the risk, made known to the agent (or a sub-agent² intrusted with the business) before the policy is issued, are constructively known to the company, and cannot be set up to defeat a recovery on the policy.³ If the agent proceeds and fills out the application upon his own knowledge, the principal cannot question the correctness of his statements.⁴ So the issue of a policy, after verbal notice to the agent of an existing incumbrance, is a waiver of the written notice required by the terms of the contract.⁵ And it has even been held that the knowledge by an agent of the assignment of a policy, prior to the declaration of bankruptcy, is notice to the company sufficient to prevent the policy from passing to the assignee in bankruptcy.⁶ But consent of an agent for securing applications to an assignment will not bind the company, when the very form of the assignment on the policy implies that it requires the consent of an officer of the company.⁷ And especially will the agent bind the company, if the applicant be compelled by the rules of the company, either to apply to the agent to make the survey, or to make it himself, strictly in accord-

companies do make the assured members, but I take it membership does not begin till the contract is complete and the policy issued. As to all preliminary negotiations, the agent acts only on behalf of the company."

¹ *Farmers' & Merchants' Ins. Co. v. Chesnut*, 50 Ill. 111.

² [The knowledge of a clerk of the agent sent by him to solicit insurance and take an application, that there was other insurance, binds the company as much as if the agent, master of the clerk, knew of it. *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa, 600.]

³ *People's Ins. Co. v. Spencer*, 53 Pa. St. 353; *Liddle v. Market Fire Ins. Co.*, 4 Bosw. (N. Y.) 179; *Beal v. Park Ins. Co.*, 16 Wis. 257; *Kelly v. Troy Fire Ins. Co.*, 3 Wis. 229; *Hough v. City Fire Ins. Co.*, 29 Conn. 10; *Keenan v. Mo. State Mut. Ins. Co.*, 12 Iowa, 126; *Combs v. Hannibal Savings & Ins. Co.*, 43 Mo. 148; *Plumb v. Cattaraugus Mut. Ins. Co.*, 18 N. Y. 392; *Ashford v. Victoria Mut. Ins. Co.*, 20 U. C. (C. P.) 434; *ante*, § 130; *post*, § 152; *May v. Buckeye Mut. Ins. Co.*, 25 Wis. 291.

⁴ *Commercial Ins. Co. v. Ives*, 56 Ill. 402.

⁵ *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. (4 Kern.) 253.

⁶ *Gale v. Lewis*, 16 L. J. N. S. (Q.B.) 119.

⁷ *Stringham v. St. Nicholas Ins. Co.*, 3 Keyes (N. Y.), 280. But see *Farmers Mut. Fire Ins. Co. v. Taylor*, 73 Pa. St. 342.

ance with certain requirements, and the agent is so applied to;¹ or if the company depends upon its own knowledge of the facts furnished by its agent after a personal examination. The issue of a policy under such circumstances is an assertion of its validity, however untrue may be the statements of the application, which the insurers cannot be allowed to gainsay.²

§ 133. **Misrepresentations and Torts of Agent.** — The agent of a stock company, appointed under its by-laws to solicit risks, receive and transmit applications, receive back and deliver policies, and receive notes for the premiums on marine risks, and cash for those on fire risks, whose services are paid for by the company by a commission on the premiums received by him, and who is specially authorized by the president and secretary to state to applicants for insurance, who inquire upon the subject, that the capital of the company is all paid in and invested according to law, may also bind the company by his representations as to the condition of the company and its ability to fulfil its contracts.³ And the company is liable to third persons for any injurious statements or acts in the course of his employment.⁴ [The representation of an insurance agent made in good faith, but without authority, that neglect to pay the premiums would not work a forfeiture but would simply turn the policy into a paid-up policy, binds the company, so far that neglect to pay premiums on the faith of the statement will not avoid the policy.⁵ A misrepresentation of the agent that non-occupancy had rendered the policy void, in consequence of which false statement the plaintiff settled for one-fourth of his rightful claim against the company, is not

¹ *Roth v. City Ins. Co.*, 6 McLean (U. S. C. Ct.), 324.

² *Cumberland Valley Mut. Prot. Ins. Co. v. Schell*, 29 Pa. 31; *Com. Ins. Co. v. Ives*, 56 Ill. 402.

³ *Fogg et al. v. Griffin et al.*, 2 Allen (Mass.), 1; *Williams et al. v. Peñ*, id.; *Jones v. Dana*, 24 Barb. (N. Y.) 395.

⁴ *New York Life Ins. Co. v. McGowan*, 18 Kans. 300; *Martin v. Aetna Life Ins. Co.* (Tenn.), 4 Ins. L. J. 899; *American Ins. Co. v. Capps*, 4 Mo. App. Rep. 571; *Eilenberger v. Protective Mut. Ins. Co.* (Pa.), 8 Ins. L. J. 822, 823; 89 Pa. St. 464.

⁵ [*Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U. S. 264.]

actionable, whether it be regarded as a statement of the law of insurance or of opinion in regard to a fact.¹ A misrepresentation by a soliciting agent in regard to the policies of a rival company is not such fraud as to avoid the contract of the assured to pay the premium. It induced him to take the policy; but the means of information were equally open to both parties, and the insured should not have relied on the "trade talk" of the agent.² Where a soliciting agent showed the plaintiff a pamphlet describing the tontine system, which plaintiff read, and the policy provided that no statements of the agent should bind the company unless reduced to writing and presented to the officers at the home office, it was held that evidence of misrepresentations made by the soliciting agent were inadmissible. In view of the full description in the pamphlet and the provisions of the policy, the agent's remarks were mere recommendations and expressions of his own opinion upon which the plaintiff had no right to rely.³ The declarations of a stranger, though made in the presence of an officer of the company, must not be relied on without inquiring if they represent the intentions of the company.⁴

And it seems that the local agent of a mutual company is presumed to be authorized to make answers to inquiries as to the standing, pecuniary or otherwise, of the company he represents,⁵ though not as to the territorial limits within which the company takes risks,⁶ unless the assured has notice that the company will not be bound by any such statements, or other statements not contained in the application.⁷ But not every such statement will bind the company. An agent appointed to "transact business" for the insurers, "and for those who are insured or make application to be insured" by them, has no authority to bind the

¹ [Thompson v. Phoenix Ins. Co., 75 Me. 55.]

² [American, &c. Ins. Co. v. Wilder, 39 Minn. 350, Dickinson, J., dissenting.]

³ [Simons v. N. Y. Life Ins. Co., 38 Hun, 309.]

⁴ [East Tex. Fire Ins. Co. v. Coffee, 61 Tex. 287.]

⁵ Devendorf v. Beardsley, 23 Barb. (N. Y.) 656. And see *post*, § 552.

⁶ Hackney v. Alleghany Co. Mut. Ins. Co., 4 Barr (Pa.), 185; *post*, § 148.

⁷ Shawmut Mut. Fire Ins. Co. v. Stevens, 9 Allen (Mass.), 332; Chase v. Hamilton Mut. Ins. Co., 20 N. Y. 52.

company by a promise that the insured shall not be called upon to pay any assessment on his premium note; though if the agent falsely represent that the delivered policy is free from assessment, the applicant will be entitled to such a one;¹ nor will his highly colored statements as to the actual pecuniary condition and future prospects of the company, not absolutely and materially fraudulent, but allowable within the fair range of embellishment and chaffer in the matter of bargain, vitiate the policy which the insured has been induced to accept under such promises and representations, unless calculated in the opinion of the jury to impose upon a careful and prudent man. If the representations are of such a character that they would vitiate other contracts, they will vitiate the contract of insurance, not otherwise. The stringent rules applied to misrepresentations by the insured in obtaining insurance, apply only to statements materially affecting the risk, and do not apply to the misrepresentations of the insurers in procuring parties to insure.² In this case a reluctant and hesitating defendant was told by the agent that the company had a great sum of money in its treasury, enough to pay all the losses for five years; that if he would pay five dollars that would be all he would have to pay; and that there would be a dividend among those insured at the end of five years. He was thus induced to pay the five dollars and take the policy. Instead of the dividend came a series of assessments, which he unsuccessfully resisted, on the ground that the policy was void by reason of the misrepresentations whereby he was induced to accept it.³ In Pennsylvania it has been held that the

¹ *Keller v. Equitable Fire Ins. Co.*, 28 Ind. 170.

² *Farmers' Mut. Fire Ins. Co. v. Marshall*, 29 Vt. 23.

³ Some observations of Redfield, C. J., are worthy of a place here: "To what extent the agent's representations, in effecting insurances, will bind the company, is a question of more difficulty. For although he is undoubtedly a general agent for transacting a particular department of the business of the company, in a limited district, still his power to bind the company is certainly not unlimited. The authority of a general agent is restricted to the range of his employment and the acts and representations which a prudent and ordinarily sagacious and experienced person might expect him to do, or to be authorized to make on behalf of his principal. The representation claimed in the present case was a remarkable

agents of a mutual insurance company cannot prejudice the rights of the company by misrepresentations as to the places where risks were located; as that the company did not take risks in cities.¹

[§ 133 A. **Facts known to Agent before Issue.** — A policy cannot be avoided by the company on the ground of facts known to the agent at the time he made the survey and application, or at any time before issue of the policy.²

one, and one not very well calculated to impose upon men much experienced in the manner of transacting the business of such companies. But so large a proportion of the people, especially in the remote rural districts of the State, are almost wholly ignorant upon these points, and are, in consequence, so readily made the victims of interested solicitors on behalf of the numerous insurance companies, who are found, I believe, always ready and urgent to insure one against all the calamities of life, that courts ought not, perhaps, to require any very rigid rules of circumspection in these matters from wholly inexperienced persons. It seems to us altogether a question of fact, whether a given representation was really calculated to impose upon a careful and prudent man. And in a case where that question should become important it would be proper, when raised by counsel, to submit it to the jury. But it seems to us that the representation of the agent in this case or stipulation, if we so consider it, is not of the class which will avoid the policy, if it would not equally avoid a written contract upon any other subject. It is undoubtedly true that, in regard to representations and concealments affecting materially the risk, both in marine and fire insurance, policies may be avoided, when in other contracts such representations certainly would not have that effect. The law of insurance has been regarded as specially requiring the utmost good faith. Hence all representations inserted in the policy, or contained in the application, and expressly referred to in the policy, as part of it, are denominated warranties, and must be strictly complied with or the policy is avoided. And in regard to representations and concealments which are material, and directly affect the risk, whether on the part of the assured or the insurer, unless the representations are substantially true, the policy is void, although such representations are merely by parol, and made at and before the time of effecting the insurance, and not inserted in the policy; they being regarded as substantial fraud in regard to a policy of insurance, while in regard to ordinary contracts similar representations would perhaps be held as within the fair range of allowable embellishment and chaffler in the matter of bargain; or, if in the nature or express warranties, would be held to have been waived, by not being inserted in the written contract."

¹ *Hackney v. Allegheny Mut. Ins. Co.*, 4 Barr (Pa.), 185; *post*, § 148.

² [*Ætna Life Ins. Co. v. Paul*, 10 Brad. 431, 443 (condition of health known to agent); *Kings' Co. Fire Ins. Co. v. Swigert*, 11 Brad. 590 (knew gasoline was kept on the premises); *German Fire Ins. Co. v. Carrow*, 21 Brad. 631 (knew buildings were not entirely on plaintiff's ground); *Germania Fire Ins. Co. v. Hick*, 23 Brad. 381 (knew interest of assured); *Key v. Des Moines Ins. Co.*, 77 Iowa, 174; *Bartlett v. Fireman's Fund Ins. Co.*, 77 Iowa, 155; *Insurance Co. v. Barnes*, 41 Kans. 161 (condition of title); *Protective Union v. Gardner*, 41 Kans. 397 (omission in application by advice of the agent); *Hartford Ins. Co. v. Haas*, 87 Ky.

Even, it is said, though those facts were falsely stated by the assured,¹ unless there was collusion between the agent and the insured to cheat the company, or facts equivalent to collusion,² or express limitation in the policy. When with knowledge of the circumstances the agent of the company filled in the application, it is not incumbent on the assured to better the condition of the premises.³ Under his warranty to keep stovepipes, &c. well secured, he is only bound to keep them in as good condition as the agent found them, it not being shown that the agent or the company in any way indicated to the insured that the pipes were not in a satisfactory state. A renewal of a policy with the agent's knowledge of misrepresentations in the original application, in the event of no new application being required, binds the company.⁴

[§ 133 B. **Collusion or its Equivalent frees the Company.** — The rule which charges a principal with the knowledge of his agent is for the protection of innocent third persons. If a person colludes with an agent to cheat the principal, the latter is not responsible for the act or knowledge of the agent.⁵ If the insured and the agent put their heads together to cheat the company so as to obtain lower rates by misrepresentation, the company will be protected. But a verdict in favor of the plaintiff necessarily negatives the existence of such conduct.⁶ False statements by the assured

531; *Richards v. Wash. Fire & Mar. Ins. Co.*, 60 Mich. 420; *Wilson v. Minn. Farmers' Mut. Ins. Ass.*, 36 Minn. 112; *Rivara v. Queen's Ins. Co.*, 62 Miss. 720 (agent knew at time of insurance that articles prohibited by policy were kept on the premises); *Breckinridge v. Amer. Cent. Ins. Co.*, 87 Mo. 62 (agent knew of incumbance at time of insurance); *Hamilton v. Home Ins. Co.*, 94 Mo. 353 (agent knew other insurance at issue of policy); *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737 (knew warranties untrue); *Siltz v. Hawkeye Ins. Co.*, 71 Iowa, 710; *Myers v. Council Bluffs Ins. Co.*, 72 Iowa, 176; *Roberts v. State Ins. Co.*, 26 Mo. App. 92; *Liverpool, &c. Ins. Co. v. Ende*, 65 Tex. 118; *Insurance Co. v. Camp*, 71 Tex. 503.]

¹ [*Miller v. Hartford Fire Ins. Co.*, 70 Iowa, 704; *Witherell v. Me. Ins. Co.*, 49 Me. 200. But see § 133 B.]

² [See § 133 B, and § 137.]

³ [*Simmons v. Ins. Co.*, 8 W. Va. 474, 495.]

⁴ [*Witherell v. Me. Insurance Co.*, 49 Me. 200, 203.]

⁵ [*National Life Ins. Co. v. Minch*, 53 N. Y. 144.]

⁶ [*Richards v. Washington Fire & Mar. Ins. Co.*, 60 Mich. 420.]

will not the less have their usual effect in avoiding the contract because the agent knows of them.¹ To tell the company a falsity through an agent who is aware of the deception is very like collusion, and identical with it so far as concerns the effect on the company and the equity of the assured. When the assured made material false representations as to his health, evidence is inadmissible to show that the local agent of the company employed to solicit risks knew at the time of their falsity.² The applicant must know the extent of the agent's authority, and in such a case must clearly be presumed to know as a reasonable man that the agent was committing a fraud upon his principal by accepting for the company what he (the agent) knew to be a false representation of the applicant's health in the application. Knowledge on the part of the agent cannot excuse wilful falsity in the assured, and although the agent knew the purpose for which a building was used at the time of loss, this was no defence to the charge that the insured knowingly made false statements in regard to that use, in the proofs of loss.³

[§ 133 C. **Agent's Negligence or Tort.** — The insurance company cannot take advantage of the laches of the agent to avoid the contract.⁴ And where A. made out an application and the agent copied it upon the blank of another company he represented, and neglected to have A. sign it, the company having received several premiums was held upon its policy though the application was never signed. An agent who has authority to bind his company "during the correspondence," makes them liable if without the applicant's fault he neglects to transmit the application to them till after a loss.⁵ When a policy of insurance after having been executed and sent to the local agent for delivery is returned to the general agent for correction and is practi-

¹ [See *contra*, *Miller v. Hartford Fire Ins. Co.*, 70 Iowa, 704.]

² [*Galbraith v. Arlington Ins. Co.*, 12 Bush (Ky.), 29, 35.]

³ [*Hansen v. Amer. Ins. Co.*, 57 Iowa, 741.]

⁴ [*Bohniger v. Empire Mut. Life Ins. Co.*, 2 T. & C. (N. Y.) 610, 611.]

⁵ [*Fish v. Cottenet*, 44 N. Y. 538.]

cally destroyed by him, — seals torn off, &c. — and when he refuses to return the same, equity will relieve the insured.^{1]}

[§ 133 D. **Time of acquiring the Knowledge** is immaterial if present, or so late as to be presumably present, in the mind of the agent at the time he acts in the business to which it relates. If one employed by the agent to see the assured and get information makes erroneous returns in the application, the company is bound by his acts and knowledge, and it is immaterial *when* such person acquired the knowledge if it was in his mind at the time he made the statements.² It has been held that to affect a corporation with knowledge of its director as such, the knowledge must have come to him while acting officially in its business.³ This is not however a correct statement of the law. It makes no difference when or how the knowledge came to him, if he had it in mind when he acted in the company's business. It would be ridiculous to hold that a board of directors might act as though ignorant of a fact that came to them on the street or otherwise before the hour of board meeting. Where an agent acquires knowledge while acting outside the business of his agency, and so long ago as not to justify the inference that he had it in mind, it will not affect the company.^{4]}

[§ 133 E. **The Agent receiving Notice** must be one whose business it is to receive such notice, as the president in respect to notice of litigation, or he must be one authorized to act in the business affected by the notice. The knowledge of an agent in order to bind the company must be that of an agent authorized to bind the company in relation to the transaction to which the knowledge relates, and is to operate as a waiver.⁵ An adjuster is a special agent whose duties are limited to ascertaining and adjusting the loss,

¹ [Chase v. Washington, &c. Ins. Co., 12 Barb. 595.]

² [Mullin v. Vt. Mut. Fire Ins. Co., 58 Vt. 113.]

³ [Farrel Foundry v. Dart, 26 Conn. 376, 383. In this case the director was interested adversely to the company.]

⁴ [Stennett v. Pa. Fire Ins. Co., 68 Iowa, 674.]

⁵ [Martin v. Jersey City Ins. Co., 44 N. J. 273 ; Redstrake v. Cumberland Ins. Co., 44 N. J. 294.]

and knowledge coming to him of a defect in the title of the assured is not imputable to the company, and his negotiations after such information do not constitute a waiver.^{1]}

§ 133 F. **Criminal Proceedings.** — An agent may be presumed to be authorized to investigate the causes of a loss, and to that end to employ a detective; but he cannot institute criminal proceedings so that his acts will bind the company unless specially thereto authorized, as the insurers have no interest different in kind from the general public interest in the punishment of the offender.²

§ 134. **Authority in the Matter of Premiums.** — Where the agent is authorized to accept the payment of premiums, he may exercise his discretion as to the mode of payment. He may, for instance, accept a note or a check, instead of the money;³ or Confederate States notes, while the notes had a value, and the government had a *de facto* existence;⁴ or, if a check is offered, his request to let the money lie, coupled with a promise to call for it when he wants it, will amount to a waiver, which he has a right to make, of the condition that the premium shall be paid before the insurance shall become binding.⁵ And the same is true whether a check is offered or not.⁶ So, if the agent requests the insured to keep the money till the policy arrives,⁷ or agrees to be himself responsible to the company for the premium, accepting the insured as his personal debtor for the amount, or encourages delay.⁸ If, however, the insured is to remit accru-

¹ [Weed v. L. & L. Fire Ins. Co., 116 N. Y. 106.]

² Norman v. Insurance Co., C. Ct. Ill., Treat, J., 4 Ins. L. J. 827.

³ Tayloe v. Merchants' Fire Ins. Co., 9 How. (U. S.) 390; Lycoming Mut. Fire Ins. Co. v. Bedford (Pa.), 2 Weekly Notes of Cases, 529.

⁴ Robinson v. International Life Assurance Soc., 42 N. Y. (3 Hand) 54.

⁵ New York Central Ins. Co. v. National Prot. Ins. Co., 20 Barb. (N. Y.) 468; Bodine v. Exchange Fire Ins. Co., 51 N. Y. 117; Southern Life Ins. Co. v. Booker, 9 Heisk. (Tenn.) 607; *ante*, § 62; *post*, § 511.

⁶ Goit v. National Prot. Ins. Co., 25 Barb. (N. Y.) 189.

⁷ Hallock v. Commercial Ins. Co., 2 Dutch. (N. J.) 268.

⁸ Sheldon v. Conn. Mut. Life Ins. Co., 25 Conn. 207; Bouton v. American Mut. Life Ins. Co., *id.* 542; Post v. Aetna Ins. Co., 43 Barb. (N. Y.) 351; Woody v. Old Dominion Ins. Co. (Va.), 9 Ins. L. J. 276; Gerlach v. Amazon Ins. Co., U. S. Dist. Ct. (Ohio), 4 Ins. L. J. 239; Home Ins. Co. v. Curtis, 32 Mich. 402; Mississippi, &c. Life Ins. Co. v. Neyland, 9 Bush (Ky.), 431; Chick-

ing premiums direct to the office, a promise of the agent, who is indebted to him, to pay them would not inure to the benefit of the assured.¹ The agent may also bind the company by his interpretation of the contract as to the day the premium falls due; as that, when the policy insures from May 29th to the 28th of the following May, the annual premium is due on the 29th.² But if the agent travels out of the usual course of business, and receives a horse as payment of the premium, it will not bind the insurer, as the authority of the agent to receive premiums cannot be presumed to extend to payments made in an unusual manner.³ So if the agent receipts for a policy on his own life.⁴

§ 135. **Agent's Authority as to the Premium; Broker.** — And upon a receipt for the premium, and the actual payment thereof to the local agent authorized by the company to make insurances binding upon them from the date of the payment to him, provided they should approve the rate of premium charged and be otherwise satisfied with the risk, it appearing that the rate charged was the usual one for that class of risks, a bill in equity for relief, the company having heard of the loss and refused to issue a policy, was sustained on the ground that the company could not be permitted to repudiate the contract of their agent, and arbitrarily refuse the risk because a loss had intervened. The neglect of the agent to forward the premium is imputable to the company.⁵ The broker through whom the negotiations

ering *v.* Globe Mut. Life Ins. Co., 116 Mass. 321; Jones *v.* Ætna Ins. Co., C. Ct. Mass., 8 Ins. L. J. 415; Angell *v.* Hartford Fire Ins. Co., 59 N. Y. 171. But *contra*, Belleville Mut. Ins. Co. *v.* Van Winkle, 1 Beasley (N. J.), 333; Catoir *v.* Am. Life Ins. & Trust Co., 33 N. J. (4 Vroom) 487. In Wall *v.* Home Ins. Co., 8 Bosw. (N. Y. Superior Ct.) 597, it was held that an agent for issuing policies and receiving premiums could not waive a forfeiture for non-payment of premium. See also *post*, § 360 *et seq.*; Church *v.* LaFayette Fire Ins. Co., 66 N. Y. 222; Peppit *v.* North British Ins. Co., 1 R. & G. (Nova Scotia) 219; Dean *v.* Ætna Life Ins. Co., 4 N. Y. S. C. 497; s. c. 62 N. Y. 642.

¹ Co-operative Life Ass. *v.* McConnico, 53 Miss. 233.

² Campbell *v.* Int. Life Ass. Soc., 4 Bosw. (N. Y. Supreme Ct.) 298.

³ Hoffman *v.* John Hancock Mut. Life Ins. Co., 92 U. S. 161.

⁴ Neuendorff *v.* World Mut. Life Ins. Co. (N. Y.), 6 Ins. L. J. 459.

⁵ Perkins *v.* Washington Ins. Co., 4 Cowen (N. Y.), 645, reversing s. c. 6 Johns. Ch. (N. Y.) 485; *ante*, § 60.

are had, and who is intrusted with the policy to be delivered, may receive the premium, and bind the company, though he does not pay it over to them, notwithstanding a condition of the policy provides that the person obtaining the policy shall be regarded as the agent of the insured.¹ And such an agent may waive the provision forfeiting the policy in case the premiums are not paid before a specified day.² He may also accept payment of the accruing premium before it is due.³ But he cannot, by antedating a receipt, obviate a forfeiture which his principal instructs him not to waive.⁴

So, where an agreement was made with an insurance company's agent for insurance, and a receipt taken by the insured for the premium, which however was not then paid, stating that the insurance would take effect on the day of its date. Ten days afterwards the property was burned, and on the following day the insured, without disclosing the fact of the fire, paid the premium to the agent, who, in ignorance of the fact of loss, forwarded the application to the company, together with the premium. A policy was returned in due form to the agent, who, having meanwhile heard of the loss, declined to deliver the policy, and tendered back the premium. In an action setting forth the above facts, the plaintiff was held entitled to damages for the loss sustained, the contract being complete when the policy was forwarded to the agent, and taking effect from the date of the receipt.⁵ So such an agent may give permission to the insured to remove the property insured to another locality.⁶

§ 136. **May waive Forfeiture for change of Residence or non-payment of Premium.** — In an action upon a life policy it appeared that the insured had, by taking up his residence

¹ *Lycoming Fire Ins. Co. v. Ward*, 90 Ill. 545.

² *Marcus v. St. Louis Fire Ins. Co.*, 63 N. Y. 625; *Dilleber v. Knickerbocker Life Ins. Co.*, 76 N. Y. 567; 4 Seld. (N. Y.) 351; *Sheldon v. Atlantic Fire Ins. Co.*, 26 N. Y. 460. But see *Critchett v. American Ins. Co.*, 9 Ins. L. J. 594.

³ *Eclectic Life Ins. Co. v. Fahrenkrug*, 68 Ill. 463.

⁴ *Diboll v. Aetna Life Ins. Co. (La.)*, 9 Ins. L. J. 827.

⁵ *Whitaker v. Farmers' Union Fire Ins. Co.*, 29 Barb. (N. Y.) 312.

⁶ *New England Fire & Mar. Ins. Co. v. Schettler*, 38 Ill. 166.

abroad, violated a provision of the policy which made it void if the assured without license from the insurers should go beyond the limits of Europe. The insured, however, notified the local agent of the insurers, at the place where he effected the insurance originally, of his change of residence, and asked before he paid any further premiums if such change would vitiate his policy, to which the agent replied that it would not if the premiums were regularly paid. Thereupon the premiums were paid, and continued to be paid regularly for several years, to the local agent and his successor, who had knowledge of the facts; but neither of the agents informed his principal of the change of residence, though regularly forwarding the premiums as received. It was contended that the agent was acting beyond the scope of his authority in assuring the insured that such change of residence would not invalidate the policy if the premiums continued to be paid, and that the notice of the change to the agents was not notice to their principal. But the court said that the party paid and the agent received the premiums upon the faith and condition that the policy was to be considered valid and subsisting; that as the agents were duly constituted for the purpose of receiving premiums as well as for other purposes, it was their duty, and not that of the insured, to communicate to the home office the circumstances under which these premiums had been paid, and the representations, terms, and conditions under which they were paid; that the insurers must be deemed to have constructive notice of the change of residence, and that upon the payment and receipt of the premiums by them they became as much bound as if the premiums had been paid directly at the home office, and had been received there with a full knowledge of the change of residence of the insured.¹ He may also waive the provision for forfeiture for non-payment

¹ *Wing v. Harvey*, 27 Eng. L. & Eq. 140, 141. See also *Miner v. Phoenix Ins. Co.*, 27 Wis. 693; *Supple v. Cann*, 9 I. L. R. o. s.; *Gloucester Manuf. Co. v. Howard Fire Ins. Co.*, 5 Gray (Mass.), 497; *Hodsdon v. Guard. Life Ins. Co.*, 97 Mass. 144; *North Berwick Co. v. N. E. Fire & Mar. Ins. Co.*, 52 Me. 336; *Walsh v. Aetna Life Ins. Co.*, 30 Iowa, 133.

of premium before the premium becomes due.¹ In *Acie v. Fernie*,² it was held that an agent to collect premiums could not, by accepting a premium after forfeiture of the policy for non-payment, bind the company so as to waive the forfeiture, although the company had charged the agent with the amount of the premium on account, in accordance with an understanding that this should be done at the expiration of fifteen days after the premium became due. But the weight of authority seems to be the other way.³ [The secretary of an insurance company may waive the breach of a condition in the policy.⁴]

[§ 136 A. An agent cannot ratify or make good a contract that never had any valid existence, as by reason of fraud *ab initio*, although he receives premiums after knowledge of the facts.⁵ A mere book-keeper who has no power to receive an overdue premium cannot bind the company by so doing.⁶]

§ 137. Limitation of Agent's Authority by Terms of Policy.

— Of course, if the insured stipulate in his application that the insurer shall not be bound by any act done or statement made to or by the agent, not contained in the application, he cannot shelter himself under a plea of equitable estoppel, by reason of the agent's fraud or negligence. The knowledge by the agent of a fact not stated in the application in that case becomes entirely immaterial, unless possibly when the statement of the fact may have been fraudulently prevented by the agent.⁷ (a) And equally, of course, such a general

¹ *Marcus v. St. Louis Mut. Life Ins. Co.*, 68 N. Y. 625.

² 7 Mees. & Wels. 151.

³ *Ante*, §§ 134, 135.

⁴ [*Haas v. Montauk Fire Ins. Co.*, 49 Hun, 272.]

⁵ [*Swett v. Citizens' Mut. Relief Soc.*, 78 Me. 541, 545 (*dictum*).]

⁶ [*Nashville Life Ins. Co. v. Ewing*, 58 Tenn. 305, 309.]

⁷ *Shawmut Mut. Fire Ins. Co. v. Stevens*, 9 Allen (Mass.), 332; *Chase v. Hamilton Ins. Co.*, 20 N. Y. (6 Smith) 52; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. (2 Bennett) 247; *Bleakley v. Niagara Dist. Mut. Fire Ins. Co.*, 16 Gr. Ch. (U. C.) 198. These cases are distinguished from *Plumb v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. (4 Smith) 392, and similar cases before cited, *ante*, § 132. In that case there was no such stipulation.

(a) See *New York L. Ins. Co. v. Dwelling-House Ins. Co.*, 75 Mo. App. Fletcher, 117 U. S. 519, 530; *Wolf v.* 337.

agent has no power to bind the company in a case where, had all the facts transpired without the intervention of an agent, the company would not be bound. Thus, where a proposal was received on the morning after a fire, information of which reached the agent in the afternoon, who on the following day countersigned and delivered a policy, it was held that the policy was invalid, as there was no contract to insure prior to the loss, the proposal not then having been accepted, nor even received.¹ Nor can such an agent make a contract, in which he himself has an interest, valid against the company;² nor, where he assigns his own policy, accept notice of the assignment.³ (a) And as there is no legal presumption that offices clothe their agents with power to fix the terms of, or perfect, the contract, and as the question of the agents' authority is always one of fact, it is always advisable in treating with them to resolve all doubts as to their powers against their authority. A company may even allow its agent to advertise his office as a "branch office;" yet if the application shows that the policy is to be issued at the home office, and the premium is to be paid when the policy is presented to the applicant, a receipt for the premium, signed by the agent, and delivered when the application is forwarded to the company, will not fix the liability of the latter, although it recites that the money received is "for insurance."⁴ So, if by the terms of the policy overdue premiums can only be paid on the company's receipt, with which he is supplied, the agent's own receipt is not binding upon the company;⁵ yet if, having power only under the

¹ Bentley v. Columbia Ins. Co., 17 N. Y. (3 Smith) 421.

² Ibid.

³ *Ex parte* Hennessey, 1 Con. & Law. 559.

⁴ Linford v. Provincial Horse & Cattle Ins. Co., 10 Jur. N. s. 1066.

⁵ Bissell v. Am. Life Ins. Co., Ct. of Com. Pleas, Lucas Co. (Pa.), 2 Big. Life & Acc. Ins. Cases, 150; *ante*, § 126.

(a) The secretary of an insurance company cannot approve his own application for insurance in his company. Pratt v. Dwelling-House M. F. Ins. Co., 130 N. Y. 206. An agent cannot insure his own property without notice to the company, even with the consent of its general agent. Zimmerman v. Dwelling-House Ins. Co., 110 Mich. 399. Nor can an agent issue a valid policy to a corporation of which he is a stock-holder and officer, but such act may be ratified. Greenwood Ice Co. v. Georgia Home Ins. Co., 72 Miss. 46.

direction of a committee to settle losses, he is in the habit of paying them by drafts on his principals, and it appears that the drafts have been honored, his authority to make the drafts will be presumed.¹

[§ 137 A. *Restrictions in Policy.* — A local agent with power to receive premiums and issue policies has no authority to waive the condition requiring written assent of the company to any change increasing the risk,² or to a removal.³ Where the agent knowing that the property was a saloon insured it, and the policy stated that the company did not take such risks, the company was held not liable.⁴ And it has been held that where the policy expressly stipulates that the company shall not be bound by any act or statement not contained in the written application, or indorsed on the policy, notice to the agent of other matters will not affect the company.⁵ An agent cannot waive non-payment of a premium note if the policy expressly declares that he shall not alter nor vary the contract.⁶ Where the policy recites that "agents of the company are not authorized to *make, alter, or discharge contracts,*" an agreement of the agent with the insured, contemporaneous with the delivery of the policy, cannot alter its terms.⁷ When a premium note promises to pay a certain sum in such portions, and at such times as the directors may agreeably to the act of incorporation require, and the application agreed that the company is not to be bound by any act or statement of its agent varying the written or printed contract, unless inserted in the application, oral evidence cannot be received to show a representation of the general agent that he had made a special and different arrangement with the company for the plaintiff.⁸

¹ *Fayles v. National Ins. Co.*, 49 Mo. 380.

² [*Kyte v. Commercial Union Assurance Co.*, 144 Mass. 43.]

³ [*Putnam Tool Co. v. Fitchburg Ins. Co.*, 145 Mass. 265.]

⁴ [*Mensing v. Amer. Ins. Co.*, 36 Mo. App. 602.]

⁵ [*Enos v. Sun Ins. Co.*, 67 Cal. 621.]

⁶ [*McIntyre v. Mich. State Ins. Co.*, 52 Mich. 188, 194.]

⁷ [*Greenwood v. N. Y. Life Ins. Co.*, 27 Mo. App. 401, 412 (agreement as to place of paying premiums). See also *Dircks v. German Ins. Co.*, 34 Mo. App. 31.]

⁸ [*Lycoming Fire Ins. Co. v. Langley*, 62 Md. 196.]

When the policy provides that waiver can only be made at the head office, and by the directors, then the agent cannot waive. The true rule is that the powers of a general agent are *prima facie* co-extensive with the business intrusted to his care, and will not be narrowed by limitations *not communicated to the person with whom he deals*. "The rule could not go further without violating all reason and justice." But in such a case as the one before us the assured had notice of the restriction on the face of his policy.¹ It seems very doubtful if the doctrine of these cases is entirely correct. The assured has a right to suppose that a general agent has all the powers ordinarily incident to his business, unless he has knowledge to the contrary, and usage may overcome the provisions of a policy. In regard to waivers before issue it is by no means clear that the constructive notice supplied by provisions of a policy not yet in the hands of the applicant should be held binding upon him. (a) Prudent men are accustomed to rely on the acts and statements of the agent, and they should be protected in so doing. Busy men have not time to study the interminable provisions of insurance policies. Only when the custom of limiting the authority of a general agent in the policy has become so general that it is a part of the ordinary business knowledge of the world that such provisions exist and are to be examined, will it be proper to hold the applicant bound by them in respect to negotiations prior to the issue of the policy. As to waivers taking place after issue, it is very proper to require the assured to look at his policy and conform to it, and limitations of the agent's authority should be effective, unless by a course of business or otherwise the

¹ [Marvin v. Universal Life Ins. Co., 85 N. Y. 278, 283.]

(a) Restrictions inserted in the policy upon the agent's power to waive any conditions unless done in a particular manner, are not deemed to apply to those conditions which relate to the inception of the contract, when it appears that the agent has delivered it and received the premiums with full knowl-

edge of all the facts and of the actual situation. Wood v. American Fire Ins. Co., 149 N. Y. 382, 386; Robbins v. Springfield F. & M. Ins. Co., id. 477; McElroy v. British North America Ass. Co., 94 Fed. Rep. 990, 994; United Firemen's Ins. Co. v. Thomas, 27 C. C. A. 42, 46, and note.

company has waived the limitation on the agent's power of waiver.

There is good authority for this view.¹ Good judges have seen fit to rule that a general agent of an insurance company may by parol waive the performance of a condition inserted in the policy for the benefit of the company, though the latter expressly declares that nothing but a written agreement, signed by an officer of the company, shall have that effect;² and there is an Ohio case to the effect that although a life policy contains notice that the agent has no authority to waive a failure to pay premium, yet the course of business may warrant the insured in relying on such waiver.³

§ 138. **Authority after Negotiations are concluded.** — Unless expressly delegated or sanctioned by known and permitted usage, the power of moulding the terms of the contract does not extend to dealing with facts and circumstances arising after the contract has been perfected. And it behooves the applicant for insurance, unless he has the most satisfactory evidence that the agent with whom he is negotiating has general and unrestricted powers⁴ to examine carefully into the extent of his authority; for the law holds him bound to know, not only whether the agent is a general or special one, but, if special, what are the limitations upon his authority.⁵ If it were not so, there would be no distinction between a general and a special agent, and all restrictions and limitations on an agent's authority would be nugatory. A principal would in all cases be at the mercy of his agent, however carefully he might have restricted his authority. An agent therefore to receive and forward applications, to countersign policies, to collect premiums, and bind the company on special hazards for ten days, is not the agent of the company to receive notice, and fix additional premium affecting its rights under a policy already issued; as where the policy provides that when premises are vacated

¹ [See § 139.]

² [Van Allen v. Farmers' Joint Stock Ins. Co., 4 Hun, 413.]

³ [Insurance Co. v. Tullidge, 39 Ohio St. 240.]

⁴ See as to these, *post*, § 151 *et seq.*

⁵ Equitable Life Ins. Soc. v. Poe (Md.), 9 Ins. L. J. 871.

the policy shall be void unless immediate notice be given to the company and an additional premium paid.¹ Nor has an agent to procure insurance power to cancel.² So, though the agent have power to adjust losses he cannot waive a forfeiture,³ or proofs of loss.⁴ (a) [A mere soliciting agent, one not furnished with blank policies to fill and issue, has no power to consent to the assignment of a policy.⁵]

[§ 138 A. **Proof of Agency.** — It must be shown that the agent of the insurance company was authorized (or held out to be) to make insurance contracts, in order to recover on a

¹ *Harrison v. City Fire Ins. Co.*, 9 Allen (Mass.) 231.

² *Rothschild v. Am. Cent. Ins. Co.*, 5 Mo. App. 596.

³ *Phoenix Ins. Co. v. Lawrence et al.*, 4 Met. (Ky.) 9; *Tate v. Citizens' Mut. Ins. Co.*, 13 Gray (Mass.), 79, and see *post*, § 145. See also *Bartholomew v. Merchants' Ins. Co.*, 25 Iowa, 507.

⁴ *Van Allen v. Farmers', &c. Ins. Co.*, 64 N. Y. 469; *Merserau v. Phoenix Ins. Co.*, 66 N. Y. 274; *Bush v. Westchester Ins. Co.*, 63 N. Y. 531.

⁵ [*Strickland v. Council Bluffs Ins. Co.*, 66 Iowa, 466.]

(a) An adjuster, who is sent by the insurer's general agent to settle and adjust a loss by fire on behalf of the company, may waive the proofs of loss which were required by the policy. *Wholley v. Western Ass. Co.*, 174 Mass. 263; *Searle v. Dwelling-House Ins. Co.*, 152 Mass. 263; *Richards v. Continental Ins. Co.*, 83 Mich. 508; *Graves v. Merchants' & Bankers' Ins. Co.*, 82 Iowa, 637; *Brown v. State Ins. Co.*, 74 id. 423; *Hartford Ins. Co. v. Keating*, 86 Md. 130; *Davidson v. Guardian Assurance Co.*, 176 Penn. St. 525; *Gould v. Dwelling-House Ins. Co.*, 134 id. 570; *Perry v. Dwelling-House Ins. Co.*, 67 N. H. 291; *Cooper v. Ins. Co. of Pennsylvania*, 96 Wis. 362; *Oshkosh Gaslight Co. v. Germania Ins. Co.*, 71 Wis. 454; *Dick v. Equitable F. & M. Ins. Co.*, 92 id. 46; *Mitchell v. Minnesota F. Ass'n.*, 48 Minn. 273; *McCullum v. Liverpool, London & Globe Ins. Co.*, 67 Mo. App. 66; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472; *Indiana Ins. Co. v. Capehart*, 103 Ind. 270; *Ætna Ins. Co. v. Shryer*, 85 id. 362; *Perry v. Faneuil Hall Ins. Co.*, 11 Fed. Rep. 482; *Mitchell v.*

Orient Ins. Co., 40 Ill. App. 111; *McPike v. Western Assurance Co.*, 61 Miss. 37; *New Orleans Ins. Co. v. Matthews*, 65 id. 301. See *contra*, *Home Ins. Co. v. Sorsby*, 60 Miss. 302; *Hollis v. State Ins. Co.*, 65 Iowa, 454; *Everett v. London & Lancashire Ins. Co.*, 142 Penn. St. 332. If the insured demands payment of a loss, and is referred to the adjuster as having authority to settle, and he demands vouchers and other proofs which cannot be furnished within the twelve months' limitation, he has implied authority to, and may, by his conduct, waive the limitation, notwithstanding a policy provision that no officer or agent shall be held to have waived any stipulation without indorsement in writing. *Dibbrell v. Georgia Home Ins. Co.*, 110 N. C. 193. Where an adjuster was sent by the company, who took a sworn detailed statement regarding the loss, substantially similar to that required in the ordinary proofs, and declared himself satisfied, this was held to be a waiver of a subsequent demand for further proofs by the company. *Graves v. Merchants' & Bankers' Ins. Co.*, 82 Iowa, 637.

policy issued by him.¹ The secretary of the company cannot be asked "What was the authority of a certain agent J.?" The proper method of proving his authority is by the production of his power of attorney, or a resolution of the board of directors.² This, however, is not necessary. It is sufficient proof of the agency of A. that the insurer has been accustomed to pay policies subscribed by him, without producing a written power of attorney which it is stated by the agent that he has.³ Where the plaintiff made application to the D. company through A., supposing him to be the agent of D., and the company received the application and the premium and issued the policy through A., the facts were held sufficient as a recognition of the assumed agency.⁴ The declarations of an agent are never evidence of his authority.⁵ In Illinois a penalty is provided against agents of foreign insurance companies acting without a certificate from the auditor.⁶

[§ 138 B. **Company v. Agent.** — Where an insurance company issues a policy on a hotel which is unoccupied, and this fact is known to the agent but not communicated to the company, the latter, having to pay a loss by burning before occupancy, can only recover nominal damages of the agent, unless the premium received were less than that usually charged for the risk actually taken (the company being in the habit of taking such risks), and then the agent would be liable for the difference of premium.⁷ Where an insurance company makes an agreement for the services of an agent for a specified term, and before the term is expired the company is restrained from doing business by order of the court, the agent has no claim on the funds in the hands of the receiver on account of the breach of the contract with

¹ [Fleming v. Hartford Fire Ins. Co., 42 Wis. 616, 621.]

² [Benninghoff v. Agricultural Ins. Co., 93 N. Y. 495.]

³ [Haughton v. Ewbank, 4 Camp. 88; Goodson v. Brooke, 4 Camp. 163; Neal v. Erving, 1 Esp. 61.]

⁴ [Packard v. Dorchester Mut. Fire Ins. Co., 77 Me. 144.]

⁵ [James v. Stookey, 1 Wash. 330, 331.]

⁶ [Pierce v. The People, 106 Ill. 11.]

⁷ [State Ins. Co. v. Richmond, 71 Iowa, 519, 523-525.]

him, at least in the absence of evidence that it was some fault of the company which induced the superintendent of insurance to make the certificate upon which the attorney-general acted.¹ Where an order from the principal to the agent is capable of different interpretations and the agent honestly adopts one and follows it, the principal is bound, and the agent exonerated.² In this case the company sent an "expiration sheet" to F., the agent, with the word "drop" opposite a certain policy; the company meant that the property indicated should not be again insured, but the agent understood simply that the amount insured upon it was to be less, and agreed to insure it for half the former risk, and the agreement was sustained.

[§ 138 C. **Cessation of the Agency.** — The agency ceases when the company goes out of business.³ When no notice of the fact that the agent through whom the policy had been effected had ceased to be agent for that branch of the company's business, had been given the assured, proofs furnished to him are sufficient proofs of loss.⁴ A promise to renew in a company that had ceased to do business, and by one whose authority as agent had been revoked, cannot bind the company, though it may be a cause of action against the pretended agent if the plaintiff did not know of the revocation.⁵ Taking out annual licenses in the names of agents does not give them a vested right to hold the agency until the close of the year.⁶]

§ 139. **Mutual Insurance Agents.** — Substantially the same general principles have been applied in most of the courts in this country⁷ in reference to agencies of mutual insurance

¹ [People v. Globe Mut. Life Ins. Co., 91 N. Y. 174, 179, 181. It seems also that, whatever the cause of dissolution, it is the act of the State and not that of the company, and that the agent so contracting takes the risk of any act or neglect of the other officers of the company that may cause dissolution.]

² [Winne v. Niagara Fire Ins. Co., 91 N. Y. 185.]

³ [Insurance Co. v. Williams, 91 N. C. 69.]

⁴ [Marsden v. City & County Ass. Co., 1 L. R. C. P. 232, 239.]

⁵ [Montross v. Roger Williams Ins. Co., 49 Mich. 477.]

⁶ [Davis v. Niagara Fire Ins. Co., 12 Fed. Rep. 281; 11 Biss. 592 (Ill.) 1882; 11 Ins. L. J. 592.]

⁷ Mutual fire insurance seems not to have had much vogue in England. The courts of Massachusetts, and to some extent those of Rhode Island, Pennsylvania,

companies, which we have seen have been applied to agencies of stock, or, as they are sometimes called, proprietary companies, upon the general ground that incorporated companies, as well mutual as others, when business is necessarily conducted through agents, should be required to see that their officers and agents not only know what their powers and duties are, but that they do not habitually and upon system transcend those powers, else third persons who have no means of access to the by-laws and resolutions which govern the body corporate, and no means of judging in the particular instance whether the officer is or is not transcending his powers, cannot deal with them with any degree of safety. A mutual insurance company, for instance, whose rules prohibit the assignment of a policy, "unless by the consent of the company, manifested in writing," but whose uniform practice has been to signify that consent by an indorsement thereof on the policy, signed by the secretary, without any formal note or direction with reference to the matter, will not be permitted to deny that such is a consent of the company. They must be held responsible, as against strangers at least, on the ground of a tacit assent and approval, for the known act of their secretary. It might be different if the act were of such a nature that by strict vigilance and scrutiny it could not be known, and was not in fact known.¹ So the consent of an agent to further insurance indorsed on the policy, such being shown to be his practice known to the company, is equivalent to the consent of the directors subscribed by the secretary, required by a provision of the charter of the company.² And any customary exercise of authority known to the principal, and not repudiated, will bind the principal.³ [The secretary of a mutual company may give the assent of the directors as their agent.⁴

and New Jersey, hold that agents of mutual insurance companies have less extensive powers. See *post*, § 145 *et seq.*

¹ *Conover v. The Mut. Ins. Co. of Albany*, 1 Comst. (N. Y.) 290, affirming s. c. 3 Denio (N. Y.), 254.

² *Peck v. New London Co. Mut. Fire Ins. Co.*, 22 Conn. 575.

³ *Brockelbank v. Sugrue*, 5 C. & P. 21.

⁴ [*Durand v. Hudson Ins. Co.*, 24 N. J. L. 171, 196.]

The directors of a mutual company may appoint the president to act for them as to indorsements.^{1]}

§ 140. **Agent of Company not necessarily Agent of Applicant, though made so by a By-law of the Company.** — The local agent of a mutual insurance company authorized to receive and forward applications is not necessarily the agent of the applicant also, though it be so provided by the by-laws, or so stipulated in the policy. Such a stipulation does not convert acts done for and in behalf of the insurers, and without the authority of the insured, into acts by which the latter is bound. When a person is in fact the agent of the insurer in procuring a policy, a clause in the policy that persons so acting are agents of the insured, and not of the insurer, does not change the fact. He is still the agent of the company as to the acts which are done in its behalf.² And if at the time of the application the latter states facts material to the risk, and the agent neglects to communicate them to the company, in consequence of which a policy is issued in ignorance of the fact, the neglect is not imputable to the applicant so as to make him responsible as for a concealment. That the agent is instructed to regard himself as the agent of the applicant rather than of the company, these instructions not being known to the applicant, does not alter the case.³ And an agent duly appointed by the local agent, in pursuance of a custom known to and approved by the company, to solicit and forward to him applications

¹ [Topping v. Bickford, 4 Allen, 120, 121.]

² Commercial Ins. Co. v. Ives, 56 Ill. 402; Bassell v. American Fire Ins. Co., 2 Hughes (C. Ct.), 531; Union Ins. Co. v. Chipp, 93 Ill. 96; Eilenberger v. Protective Ins. Co. (Pa.), 89 Pa. St. 464; Andes Ins. Co. v. Loehr, C. C. P. N. Y. City, 4 Ins. L. J. 465; Planters' Ins. Co. v. Myers, 55 Miss. 479; Farmers' Ins. Co. v. Munn, App. Ct. of Ill., First Dist., 9 Ins. L. J. 159. There are cases of high authority to the contrary. See Alexander v. Germania Ins. Co., 66 N. Y. 464, following Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47; and see also these cases explained and limited to the special facts of the cases, if not overruled, in the same court in Whited v. Germania Ins. Co., 76 N. Y. 415. The point of a quasi-dual agency is thoroughly discussed in Southern Law Rev., Nov. 5, 1880, p. 663, by Hon. J. O. Pierce, who arrives at the conclusion that the decided weight of authority is in accordance with the view stated in the text. See also *post*, § 473.

³ Bebee v. The Hartford Mut. Fire Ins. Co., 25 Conn. 51.

for insurance, stands in the same relation to the company as to such mistakes.¹

And the same is true where the agent assumes to fill up the application from actual observation, and, while giving a full description of the property, neglects to mention matters material to the risk, which, however, were open to his observation. This is no concealment or withholding of information on the part of the insured. And the company would be bound by the agent's overestimated value of the property not induced by the applicant.²

So if the agent neglects to state in the application the fact of an existing incumbrance which is truly stated to him by the applicant, notwithstanding the application, by a memorandum in the margin, required the applicant to state whether the property is incumbered, by what, and to what amount, and if not, to say so; and although the by-laws make the person taking the survey the agent of the applicant. He is still the agent of the company, and as such it is so far bound by his acts that it cannot set up his negligence as a concealment on the part of the insured.³ When the policy, however, provides not only that the agent shall be deemed the agent of the applicant and not of the company, but further, that the company will not be bound by anything said by the agent not contained in the application, there can be no escape for the insured. He will find himself practically uninsured.⁴

§ 141. **Agent may by his Acts estop his Principal.** — Indeed, such an agent may so conduct his business as to estop

¹ Woodbury Savings Bank v. Charter Oak Ins. Co., 31 Conn. 517.

² Cumberland Valley Mut. Proct. Co. v. Schell, 29 Pa. St. (5 Casey) 31; Commercial Ins. Co. v. Ives, 56 Ill. 402. See also Farmers' Ins. Co. v. Muun, App. Ct. of Ill., First Dist., 9 Ins. L. J. 159; *post*, § 473.

³ Masters v. Madison Co. Mut. Ins. Co., 11 Barb. (N. Y. S. C.) 624; Columbia Ins. Co. v. Cooper, 50 Pa. St. 331; *ante*, § 131; *post*, § 500; Naughton v. Ottawa Agr. Ins. Co., 43 U. C. (Q. B.) 121; Wyld v. London, &c. Ins. Co., 23 Grant's Ch. 442 (U. C.); Benson v. Ottawa Agr. Ins. Co., 42 U. C. (Q. B.) 282; *ante*, § 13.

⁴ Shawmut Mut. Fire Ins. Co. v. Stevens, 9 Allen (Mass.) 332; Moore v. Conn. Mut. Fire Ins. Co., 41 U. C. (Q. B.) 497; Johnstone v. Niagara Dist. Mut. Ins. Co., 13 U. C. (C. P.) 331; Bleakley v. Niagara Dist. Mut. Ins. Co., 16 Grant (U. C. Ch.) 198. See also *ante*, § 137, and *post*, § 206.

the company he represents from denying the truth of the statements made in the application; as by assuming to fill up and forward an application, signed by himself as agent of the applicant, but without authority to do so. Thus where the agent was requested by the applicant to copy the answers which he was upon the point of making in another application for insurance upon the same property, but instead of waiting till he received such answers to copy forwarded to his company an old application for insurance upon the same property, corrected by himself to suit what he supposed to be the change of circumstances, thus sending an application which he was not authorized by the applicant to send; he was held to be the agent of the company so far as to estop them from denying the contract, and from setting up its mistakes as misrepresentations working a forfeiture. He was at least the agent of the company for forwarding the application, and his misconduct in that regard was imputable to his principal, and could not be allowed to prejudice the rights of the applicant, who did not know of it, and supposed, and had a right to suppose, he was insured upon the basis of the application which he actually did send to the agent, but which the agent did not forward. And the court would not compel the insured to go to a court of equity for relief, feeling authorized as a court of law to apply precisely the same rules of equitable waiver and estoppel as are applied in courts of equity.¹

But if an agent to whom the assured by letter applies for insurance fills up an application, and signs thereto the name of the assured, though without his knowledge, and the insured afterwards receives a policy with a copy of the application annexed, the application being expressly made part of the contract, and the contract providing that by accepting the policy the insured becomes responsible for the truth of the statements contained in the application, the fact that the original statement was made by the agent, and without

¹ *Wilson v. Conway Mut. Fire Ins. Co.*, 4 R. I. 141. And see also *Denny v. Conway Stock & Mut. Fire Ins. Co.*, 13 Gray (Mass.), 492; *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. 253, 258.

the knowledge of the assured, will not avail to prevent a forfeiture by reason of a material false statement.¹

§ 142. **Their Knowledge and their Mistakes those of the Principal.** — And such agent's knowledge of the existence of a fact material to the risk — as, for instance, a steam-boiler in the building, but not mentioned in the application — is the knowledge of the company, and precludes them from excepting to the defect in the application.²

And material errors made by the agent in the surveys and measurements, such as if made by the applicant would amount to a breach of warranty, cannot be set up by the company in defence to an action for a loss under the policy. The misstatement is in law the misstatement of the company; and although the writing must be held to express the contract of the parties, and cannot be varied by parol evidence, yet when the insurance company which made this statement attempts to show that it is false, for the purpose of showing a breach of the warranty, it may justly be estopped to deny what it has once asserted.³

So if the agent of the company, there being no written application, gives a description of the property, from his own knowledge obtained by personal examination, which description is inserted in the policy, and it is denied that the property destroyed was covered by the policy, the company will not be allowed to take advantage of any inaccuracy in the language of the description, there being no evidence of any attempt to mislead on the part of the assured.⁴

§ 143. **Agent's Power to waive and estop.** — It has, in fact, been very generally held that knowledge by, or notice to, the agent, of the inaccuracy of a statement in the application upon which a policy is issued after such notice or knowledge, binds the company, and prevents them from availing themselves of the inaccuracy in defence, some of

¹ *Richardson v. Maine Ins. Co.*, 46 Me. 394. And see also *Goddard v. Monitor Ins. Co.*, 108 Mass. 57.

² *Campbell v. Merchants' & Farmers' Mut. Ins. Co.*, 37 N. H. 35; *ante*, § 132.

³ *Plumb v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. (4 Smith) 392; *Howard Ins. Co. v. Bruner*, 23 Pa. St. (11 Harris) 50; *post*, § 498.

⁴ *Meadowcroft v. Standard Fire Ins. Co.*, 61 Pa. 91. And see *ante*, § 132.

the cases regarding the facts as amounting to a waiver, and others as working an estoppel *in pais*. And this is true even though the policy provide that when the application is made through an agent of the company the applicant shall be responsible for such agent's representations.¹

¹ *Miller v. Mut. Ben. Life Ins. Co.*, 31 Iowa, 216; *Clark v. Union Mut. Fire Ins. Co.*, 40 N. H. 333; *Peck v. New London Co. Mut. Fire Ins. Co.*, 22 Conn. 575; *Hodgkins v. Montgomery Co. Mut. Ins. Co.*, 34 Barb. 213; *Patten v. Merchants' & Farmers' Mut. Fire Ins. Co.*, 40 N. H. 375; *Campbell v. Merchants' & Farmers' Mut. Ins. Co.*, 37 N. H. 35; *Marshall v. Columbian Mut. Ins. Co.*, 7 Fost. (N. H.) 157; *Prot. Ins. Co. v. Harner*, 2 Ohio, n. s. 452; *Howard Fire Ins. Co. v. Bruner*, 23 Pa. St. 50; *Rex v. Insurance Companies*, 2 Phila. (Pa.) 357; *Kelly v. Troy Fire Ins. Co.*, 3 Wis. 254; *Masters v. Madison Co. Mut. Ins. Co.*, 11 Barb. (N. Y.) 624; *Plumb v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. (4 Smith) 392; *Williams v. Niagara Ins. Co.* (Iowa), 9 Ins. L. J. 38; *Davey v. Glens Falls Ins. Co.*, C. Ct. (Minn.) 9 Ins. L. J. 497; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; *Germania Fire Ins. Co. v. McKee*, 94 Ill. 494; *Benson v. Ottawa Agr. Ins. Co.*, 42 U. C. (Q. B.) 282; *Wyld v. Lon., Liv., & Globe Ins. Co.*, 23 Grant Ch. (U. C.) 442; *Re Universal Non-Tariff Fire Ins. Co.*, L. R. 19 Eq. 485; *Hastings Mut. Fire Ins. Co. v. Shannon*, 2 Can. S. C. Rep. 394; *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 195; *American Ins. Co. v. Gallatin* (Wis.), 9 Ins. L. J. 50; *Planters' Mut. Ins. Co. v. Deford*, 38 Md. 382; *Mowry v. Rosendale*, 74 N. Y. 360; *Dayton Union Ins. Co. v. McGookey*, 33 Ohio St. 555; *Planters' Ins. Co. v. Sorrells*, 1 Bax. (Tenn.) 352; *Cheek v. Columbia Fire Ins. Co.*, 4 Ins. L. J. 99; *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619, affirming s. c. 3 N. Y. S. C. 33; *Hadley v. New Hampshire Fire Ins. Co.*, 55 N. H. 110; *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 6, affirming s. c. 61 Barb. (N. Y. S. C.) 335; *Fishbeck v. Phoenix Ins. Co.* (Cal.), 11 Repr. 218; *Ayres v. Home Ins. Co.*, 21 Iowa, 185; *Kreutz v. Niagara Dist. Mut. Fire Ins. Co.*, 16 U. C. (C. P.) 131; *Farmers' Mut. Fire Ins. Co. v. Taylor*, 73 Pa. St. 342; *Hayward v. National Ins. Co.*, 52 Mo. 181; *Dodge Co. Mut. Ins. Co. v. Rogers*, 12 Wis. 337; *Geib v. International Ins. Co.*, 1 Dill. C. Ct. 443, 449; *Ben Franklin Ins. Co. v. Gillett* (Md.), 9 Ins. L. J. 774; *American Central Ins. Co. v. McLanathan*, 11 Kans. 533; *Broadhead v. Lyecoming Fire Ins. Co.* (N. Y. Sup. Ct.), 11 Repr. 346; *Bennett v. North Brit. Ins. Co.* (N. Y.), 9 Ins. L. J. 585; *Reaper City Fire Ins. Co. v. Jones*, 62 Ill. 458; *North Am. Fire Ins. Co. v. Throop*, 22 Mich. 146; *Winans v. Allemania Fire Ins. Co.* 38 Wis. 342; *Williams v. Canada Fire Mut. Ins. Co.*, 27 U. C. (C. P.) 119 (showing a tendency to relax the strictness of former cases. See *Chatillon v. Canadian Mut. Fire Ins. Co.*, 27 U. C. (C. P.) 450, where it was held that, if the applicant could not read, the insurers were bound by the application filled out by the agent, otherwise if the applicant be able to read; and *Newcastle Fire Ins. Co. v. MacMorran et al.*, 3 Dow, 255, where it seems to have been taken for granted that such was the law); *Perry Co. Ins. Co. v. Stewart*, 19 Pa. St. 45; *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. 253, 258; *Somers v. Athenaeum Fire Ins. Co.*, 9 Low. Can. R. 61; *Michael v. Mut. Ins. Co. of Nashville*, 10 La. An. 737; *Roth v. City Ins. Co.*, 6 McLean (U. S.), 324; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Beal v. Park Ins. Co.*, 16 Wis. 241; *Davis v. Scottish Prov. Ins. Co.*, 16 U. C. (C. P.) 176. The cases of *Kennedy v. St. Lawrence Co. Mut. Ins. Co.*, 10 Barb. (N. Y.) 285; *Sexton v. Montgomery Co.*

And, indeed, the tendency of the courts generally is daily becoming more decided to hold that such an agent may waive any of the conditions of the policy and bind the company by such waiver, and that his promises and acts, both of omission and commission, representations, statements, and assurances, made within the scope of his agency, and after knowledge of a breach of condition, or of the untruthfulness, inaccuracy, or incompleteness of the statements in the application, if relied upon by the insured to his prejudice, may be set up by him, being himself without fault, either on the ground of waiver or of estoppel, in answer to a claim of forfeiture.¹ If the agent be guilty of fraud upon the insurers, and the insured knowingly aids in its perpetration, or, by neglecting to read the application, suffers it to be perpetrated, he is not without fault.²

The local agent of an insurance company authorized to issue and renew policies, and receive premiums, may consent to a change of title;³ and in Wisconsin, where the code makes him an agent "to all intents and purposes," he may waive a forfeiture by reason of change of title, by the accept-

Mut. Ins. Co., 9 Ind. 191; and *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Denio (N. Y.), 75, to the contrary, cannot be reconciled with the later cases in the New York courts. See also *post*, § 180 *u*.

¹ *Columbian Ins. Co. v. Cooper*, 50 Pa. St. 331; *Franklin v. Atlantic Fire Ins. Co.*, 42 Mo. 456; *Keeler v. Niagara Ins. Co.*, 16 Wis. 523; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *Boehen v. Williamsburgh Ins. Co.*, 35 N. Y. 131; *May v. Buckeye Mut. Ins. Co.*, 25 Wis. 291; *Peoria Mar. & Fire Ins. Co. v. Hall*, 12 Mich. 202; *Brandaf v. St. Paul Fire & Mar. Ins. Co. (Minn.)*, 11 Repr. 434. By statute in New Hampshire it is provided, in relation to the insurance companies of that State, that when applications are taken by an agent the policy shall not be void by reason of any error, mistake, or misrepresentation not intentionally and fraudulently made. Laws 1855, c. 1662, § 6; *De Lancey v. Rockingham Mut. Fire Ins. Co.*, 52 N. H. 581. The law has, however, no effect upon foreign insurance companies. *Campbell v. Merchants' & Farmers' Mut. Ins. Co.*, *ubi sup*. See also cases cited in the preceding note. There are applications which restrict the powers of agents and call attention to these restrictions more or less conspicuously, leaving the applicant in a hopeless predicament if he has warranted his answers in all respects true. *Lee v. Guardian Life Ins. Co. (C. Ct. Cal.)*, 5 Big. Life & Acc. Ins. Cas. 18; s. c. 2 Cent. L. J. 495. See also *ante*, § 137; *post*, § 206; *Clevenger v. Mut. Life Ins. Co. (Dak.)*, 9 Int. L. J. 129.

² *Ryan v. World Mut. Life Ins. Co.*, 41 Conn. 163. See also *Lee v. Guardian Life Ins. Co. (C. Ct. Cal.)*, 5 Big. Life & Acc. Ins. Cas. 18; s. c. 2 Cent. L. J. 495. See also *post*, § 507.

³ *Ill Mut. Fire Ins. Co. v. Stanton*, 57 Ill. 354.

ance of the premium and the issue of a renewal receipt, with full knowledge of the change of title;¹ he may also, after the issue of the policy, and in contravention of its provisions, consent to further insurance.²

§ 144. *Same Subject.* — To these numerous and respectable authorities the Supreme Court of the United States has added the weight of its deliberate approval.³ That court holds the language quoted in the note.⁴ In Iowa,⁵ the broad proposi-

¹ *Miner v. Phoenix Ins. Co.*, 27 Wis. 693; s. c. 1 Ins. L. J. 41.

² *Schoener v. Hekla Fire Ins. Co. (Wis.)*, 10 Ins. L. J. 806.

³ *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *American Ins. Co. v. Mahone*, 21 Wall. (U. S.) 152; *Eames v. Home Ins. Co.*, 94 U. S. 621. [See, however, § 145 A. for a later case in the same court, which moves in the opposite direction.]

⁴ "This question has been decided differently by courts of the highest respectability in cases precisely analogous to the present. It is not to be denied that the application, logically considered, is the work of the assured, and if left to himself as to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. On the other hand, it is well known — so well that no court would be justified in shutting its eyes to it — that insurance companies organized under the laws of the State, and having in that State their principal business office, send their agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts; and the party who is in this manner induced to take out a policy rarely sees or knows anything about the company or its officers by whom it is issued, but looks to, and relies upon, the agent who has persuaded him to effect insurance, as the full and complete representative of the company in all that is said or done in making the contract. Has he not a right to so regard him? It is yet true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this, and yet limit the responsibility of the acts of these agents to the simple receipt of the premium and delivery of the policy; the argument being that as to all other acts of the agent he is the agent of the insured. This proposition is not without support in some of the earlier decisions on the subject; and, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward application on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine in its full force to the system of selling policies through agents, which we have described, would be a delusion and a snare, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance companies receive the benefit, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direc-

⁵ *Miller v. Mut. Benefit Life Ins. Co.*, 31 Iowa, 216.

tion has been affirmed that "an insurance company transacting business through an agent having authority to solicit, make out, and forward applications, to deliver policies when returned, and to collect and transmit premiums, is affected by the knowledge acquired by such agent when engaged in procuring an application, and bound by his acts done at such time with respect thereto."¹ In order, however, that statements made to the company's agent, but misunderstood or not set down by him in the application, may protect the insured from the consequences of misrepresentation, it should appear that they were made at the time when the application was taken, and in connection therewith; statements made at a prior and fruitless interview cannot have that effect.²

tion. The powers of the agent are, *prima facie*, coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the persons with whom he deals. *Beebe v. Hartford Ins. Co.*, 25 Conn. 51; *Lycoming Ins. Co. v. Schollenberger*, 8 Wright (Pa.), 259; *Beal v. Park Ins. Co.*, 16 Wis. 241; *Davenport v. Peoria Ins. Co.*, 17 Iowa, 276. An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal. *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Horwitz v. Equitable Ins. Co.*, 40 Mo. 557; *Ayres v. Hartford Ins. Co.*, 17 Iowa, 176; *Howard Ins. Co. v. Bruner*, 11 Har. (Pa.) 50.

"In the fifth edition of *American Leading Cases*, after a full consideration of the authorities, it is said: 'By the interested or officious zeal of the agents employed by the insurance companies in the wish to outbid each other and procure customers, they not unfrequently mislead the insured by a false or erroneous statement of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the assured, be regarded as the act of the insurers.' Vol. ii. p. 947; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550. The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name was signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it." [If testimony is admitted to show that the application was not that of the assured, and that application is declared by the policy to be the basis of the contract, does not such testimony show that there is no contract?]

¹ *New Jersey Mut. Life Ins. Co. v. Baker*, 94 U. S. 610.

² *Boggs et al. v. America Ins. Co.*, 30 Mo. 63.

[§ 144 A. In regard to matters correctly stated to him or known to him, his mistakes without fault or knowledge of the assured bind the company.¹ Such is the rule laid down by the majority of the cases in very broad terms, even though the policy declares the statements in the application to be warranties.² If an ignorant applicant is imposed on or taken advantage of by the agent and so fails to state the interest of another person, as required by the policy, he will nevertheless be protected after loss to the extent of his own real interest.³ Bad faith is worse than ignorance. If the agent deceives the assured as to the filling up of the application so that it states a falsehood, the company is estopped from setting this up as a defence.⁴ (a)]

¹ [Williamson v. New Orleans Ins. Ass., 84 Ala. 106 ; Brown v. Commercial F. Ins. Co., 86 Ala. 189 ; Ala. Gold Life Ins. Co. v. Garner, 77 Ala. 210 ; O'Brien v. Home Ben. Soc., 51 Hun, 495 ; Pickel v. Phenix Ins. Co., 18 Ins. L. J. 598 (Ind.), June, 1889 ; Continental Ins. Co. v. Munns, 120 Ind. 30 ; Kingston v. Ætna Ins. Co., 42 Iowa, 46, 47 ; Wheaton v. North Brit. & Mer. Ins. Co., 76 Cal. 415 ; Stone v. Hawkeye Ins. Co., 68 Iowa, 734 ; Hornthal v. Insurance Co., 88 N. C. 71 ; Western Ass. Co. v. Rector, 85 Ky. 295 (misrepresentation of title by agent) ; Kansal v. Minn., &c. Fire Ass., 31 Minn. 17 ; Menk v. Home Ins. Co., 76 Cal. 50 ; Continental Ins. Co. v. Pearce, 39 Kans. 396 (insured signed the application not knowing its contents) ; Young v. Travellers' Ins. Co., 80 Me. 244 (agent misstates date of accident in the proofs) ; Continental Life Ins. Co. v. Thoena, 26 Brad. 495 ; Phenix Ins. Co. v. Allen, 109 Ind. 273 (misdescription of property by agent) ; Sullivan v. Phenix Ins. Co., 34 Kans. 170 (deliberate fraud of agent). A local soliciting agent filling up an application acts for the company, and if he makes a mistake in regard to matters correctly stated to him by the applicant, the company is bound. Insurance Co. v. Williams, 39 Ohio St. 584, 588. If the insured fully and correctly states the facts to the agent, misleading or erroneous answers inserted in the application by such agent estop the company. Kenyon v. Knights Templars, &c. Aid Ass., 48 Hun, 278.]

² [Continental Ins. Co. v. Pearce, 39 Kans. 396.]

³ [Diebold v. Phenix Ins. Co., 33 Fed. Rep. 807 (Kan.), 1888.]

⁴ [Geib v. International Ins. Co., 1 Dill. 443, 447.]

(a) If the agent writes untrue or partial answers in the application, when the applicant answers truly or more fully upon a material question, the insurer is bound by the answers really made, as the insurer has notice through him. Standard L. & Acc. Ins. Co. v. Davis, 59 Kansas, 521 ; Kansas Mill-owners' M. F. Ins. Co. v. Central Nat. Bank, 60 id. 630 ; State Ins. Co. v. Gray, 43 id. 731 ; Clubb v. American

Acc. Co., 97 Ga. 502 ; Robinson v. Met'n L. Ins. Co., 37 N. Y. S. 146 ; McGuire v. Hartford F. Ins. Co., 40 id. 300 ; Peters v. U. S. Ind'l Ins. Co., 42 id. 348 ; Clemens v. Supreme Assembly (N. Y.), 16 L. R. A. 33, and note ; Lumbermen's Mut. Ins. Co. v. Bell, 166 Ill. 400 ; Rochester Loan & B. Co. v. Liberty Ins. Co., 44 Neb. 537 ; Home F. Ins. Co. v. Fallon, 45 Neb. 554 ; German-American Ins. Co. v. Hart, 43 Neb. 411.

[§ 144 B. Omissions or false answers made by the agents of a company, with no collusion by the assured, do not avoid the policy.¹ When an agent of the company with full knowledge of the facts makes out an application, it is conclusive upon the company.² In Maine this is so by statute.³ A mistake of an agent of the company in naming the owners in the application or in the proofs of loss without knowledge of the assured, cannot defeat the policy.⁴ The insurance company is responsible for the negligence of its agent in wrongly stating the age of the applicant in the application, having been correctly informed.⁵ Where the applicant is ignorant and in good faith trusts to the agent in making the application, it is the company's act.⁶ If the medical examiner acting as agent of the company undertakes to write the application from his own knowledge, rather than from the answers of the assured, the company is responsible.⁷]

[§ 144 C. If the agent makes a misstatement in the application and gets the insured to sign it without acquainting him with the contents, the company is bound by the statement.⁸ An omission in the description of the property by mistake of the agent in filling out the application, afterward signed by the insured, will not prejudice the latter, even though the policy provides that the agent shall be deemed to act for the insured.⁹ Parol is admissible to show that the statements given to the agent were different from those in the application transcribed by him and sent to the company, though the application was signed by the insured, not knowing its contents were different from the statements he

¹ [McArthur v. Globe Mut. Life Ins. Co., 14 Hun, 348, 354.]

² [Andes Ins. Co. v. Fish, 71 Ill. 620, 623.]

³ [Caston v. Monmouth Mut. Fire Ins. Co., 54 Me. 170, 172.]

⁴ [Parker v. Amazon Ins. Co., 34 Wis. 363, 370.]

⁵ [McCall v. Phoenix Mut. Life Ins. Co., 9 W. Va. 237, 243.]

⁶ [Hartford Ins. Co. v. Haas, 87 Ky. 531. In this case an ignorant German woman who had only a dower interest was protected, although the policy was conditioned to be void unless interests other than a fee simple were stated. The agent had obtained knowledge of the real facts in another transaction.]

⁷ [Pudritzky v. Knights of Honor, 76 Mich. 428.]

⁸ [Dunbar v. Phenix Ins. Co., 72 Wis. 492.]

⁹ [Insurance Co. v. Cusick, 109 Pa. St. 157.]

had made to the agent.¹ If the agent fills out the application, the insured, being ignorant of false statements therein, is not affected by them, although a copy of the application was attached to the policy, and he failed to give notice to the company that the statements were untrue.² When the company's agent, knowing the circumstances (viz., an incumbered equitable title), filled in the application, "fee simple — no incumbrances," and the assured signed it without reading, supposing it was all right, it was held that the company could not set up concealment or breach of warranty.³ If an agent, knowing of incumbrances, states in the application that there are none, and procures the signature of the applicant who is ignorant in such matters, the condition against incumbrances is waived, notwithstanding the policy says there shall be no waiver but in writing signed by the president or secretary.⁴

[§ 144 D. If an agent fills in an answer to a question that was not propounded to the insured and which he did know was in the application signed by him in reliance on the agent and without reading, the answer is the act of the company.⁵ If A. goes to insure his wife's property and tells the agent the facts and requests a policy in his wife's name, but the agent makes the policy in A.'s name, A. may sue on the policy as agent of his wife.⁶ When an agent accepts a verbal application, and afterward writes out an application without the insured's knowledge, she is not bound by it, although the policy refers to it. It would be a fraud on her to hold her to an application she knew nothing of.⁷ It is doubtful whether even the delivery of a policy is notice of its contents to one who cannot read, and who is assured by the agent that it is all right, and in accordance with the

¹ [Continental Ins. Co. v. Pearce, 39 Kans. 396.]

² [Donnelly v. Cedar Rapids Ins. Co., 70 Iowa, 693.]

³ [Combs v. Hannibal Savings & Ins. Co., 43 Mo. 148, 151; Dahlberg v. St. Louis Mut. Fire & Mar. Ins. Co., 6 Mo. App. 121, 128.]

⁴ [Renier v. Dwelling-House Ins. Co., 74 Wis. 89.]

⁵ [Schwarzbach v. Protective Union, 25 W. Va. 624, 661.]

⁶ [Deitz v. Insurance Co., 31 W. Va. 851.]

⁷ [Baker v. Insurance Co., 70 Mich. 199.]

contract.¹ (a) Where an application was signed by the insured and afterward changed by the agent without the knowledge of the assured, it was held that the company was bound, and the insured could not be held on the inserted warranty (but in this case, as the policy plainly stated that if the insured was not the sole, &c., owner the title must be expressed, and he had not expressed his interest, the policy was void, and he could not be heard to say that he had not read it).² If an agent substitutes a spurious application for that made by the assured, the company cannot rescind on discovering of the fraud.³

¹ [Continental Ins. Co. v. Ruckman, 127 Ill. 364.]

² [Swan v. Watertown Fire Ins. Co., 96 Pa. St. 37, 43.]

³ [Mass. Life Ins. Co. v. Eshelman, 30 Ohio St. 647, 657.]

(a) It is the duty of the insured upon receiving his policy to examine it promptly and, if it does not contain the stipulations agreed upon between him and the agent, to at once notify the company of his refusal to accept the policy. The fact that the insured cannot read does not relieve him of the duty to inform himself seasonably whether or not the contract, as executed and delivered to him, complies with the original understanding, such duty being the same as rests under such circumstances upon contracting parties who are not illiterate. *McHoney v. German Ins. Co.*, 52 Mo. App. 94; but see *Omaha F. Ins. Co. v. Crighton*, 50 Neb. 314. Where a policy of insurance, with a copy of the application indorsed thereon, was sent by the company to the insured, and was in his possession for several months before the loss occurred, he was held chargeable in law with knowledge of the contents of both the policy and the application; and the circumstance that the assured did not actually read or know the contents of the application, or know that a copy of the application was indorsed on the policy, makes no difference, but the paper being his own contract, and in his actual custody, he will be presumed to know all it contains, even if the copy on the back was not re-

ferred to in the body as being indorsed there. *Johnson v. Dakota F. & M. Ins. Co.*, 1 No. Dak. 167. After repeated payments of the annual premiums, the insured is presumed to be familiar with the terms of his policy. *Union Central L. Ins. Co. v. Hook* (Ohio), 56 N. E. 906. When the policy is delivered by the insurer at the place and to the person named by the insured, he is bound by its terms, though he does not read it, there being no evidence of anything to prevent him from so doing. *Ætna Ins. Co. v. Holcomb*, 89 Texas, 404, 410; *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356, 364. On the other hand, in *McElroy v. British America Ass. Co.*, 94 Fed. Rep. 990, 1000, the insured was held entitled to rely upon the agent's making the contract conform with his application, and his neglect to read the entire policy was held not to excuse the insurer for such default of its agent. See also *Gristock v. Royal Ins. Co.*, 87 Mich. 428; *Delouche v. Met'n L. Ins. Co.* (N. H.), 45 Atl. 414; *McMaster v. New York L. Ins. Co.*, 99 Fed. Rep. 856; *Dryer v. Security F. Ins. Co.* (Iowa), 82 N. W. 494; *Shedden v. Heard* (Ga.), 35 S. E. 707; *Wilson v. National L. Ins. Co.*, 31 Misc. Rep. (N. Y.), 403. See *infra*, § 200, note (a).

[§ 144 E. Where the agent, knowing the facts of a mortgage for \$2,000 covering two buildings, one of which was the mill insured, of his own motion apportioned the mortgage and called it \$1,000 on each building, so that the application for insurance on the mill represented the incumbrances on it as \$1,000, the evidence of these facts should be admitted to show that the company was aware of the true state of the case, and therefore estopped.¹ Where an insurance agent, with full knowledge of the facts, causes the applicant to make a wrong statement, the company is estopped, there being no bad faith on the part of the assured.² So, if the agent and the insured are both ignorant of a change of ownership in the premises upon which the insured holds a mortgage, a misstatement by the agent resulting from such ignorance cannot be taken advantage of by the company.³ When an agent has authority to procure insurance and forward applications, his acts in filling out such applications, without knowledge of the assured, bind the company, in spite of a stipulation in the policy subsequently issued to the effect that he shall be deemed to have acted for the insured.⁴ This is not a violation of the rule that verbal testimony is not admissible to vary a written contract. It proceeds on the ground that the contents of the paper were *not* his statement, — that the writing is not the contract made, though signed by the insured. Although parol is not admissible to vary a written contract, it *is* admissible to effect an estoppel, as by showing that the agent took advantage of the inability of the insured to read, or misled him as to the provisions of the policy.⁵ An applicant is, however, *presumed* to have read the application before signing it, and in the absence of proof that she was imposed on, or that the agent knew the falsity of the statement, — of value, for example, — it will be fatal.⁶ Even proof that the agent

¹ [Ring v. Windsor Co. Mut. Fire Ins. Co., 51 Vt. 563, 569.]

² [Mut. Benefit Life Ins. Co. v. Daviess' Ex'x, 87 Ky. 541]

³ [Poughkeepsie Savings Bank v. Manhattan Fire Ins. Co., 30 Hun, 473.]

⁴ [Deitz v. Insurance Co., 31 W. Va. 851, 856, 857.]

⁵ [Rivara v. Queen's Ins. Co., 62 Miss. 720.]

⁶ [Briggs v. Fireman's Ins. Co., 65 Mich. 52.]

filled in the answers after the application was signed and after he returned to his office, is not enough without evidence that his statements differed from those that had been made to him, or which he knew to be the correct ones.¹ It has been held that evidence that the insured answered the agent truly, that the agent filled in the application, and that the applicant signed it supposing it to be correct is inadmissible, in answer to the defence that the application contains material falsities. The insured is presumed to know what he signs. Afterward, however, the ruling was reversed, and the doctrine advanced that such evidence *is* admissible, and he may recover on showing that his oral answers were true, and the other facts as above.²

[§ 144 F. When the policy on merchandise in a store prohibited the keeping of petroleum and a barrel was on hand when the fire occurred, it was held to avoid the policy *even though the agent knew of this at the execution of the policy*.³ Notice to an agent whose authority extends merely to receiving and forwarding applications, premiums, and policies, that gunpowder is kept in the store, is not notice to the company.⁴ A warranty that the building insured is a dwelling-house occupied by the applicant, when really it was unfinished and unoccupied, is fatal, although the agent inspected the building and wrote the application, reading it, however, to the insured, who signed it. With respect to such an application the agent acts for the insured.⁵ Where the policy states that the assured adopts and warrants all statements in the application, he cannot set up the fact that the agent improperly and untruthfully filled out the application after being correctly informed.⁶ If the policy clearly describes one building, no external evidence is admissible to show that another was meant, even though the description

¹ [Brown v. Metropolitan Life Ins. Co., 65 Mich. 306.]

² [Fletcher v. N. Y. Life Ins. Co., 3 McCrary, 603, 607 ; 11 Fed. Rep. 377 ; 12 Fed. Rep. 557 ; 13 Fed. Rep. 526 ; 14 Fed. Rep. 846 ; 12 Ins. L. J. 122.]

³ [Birmingham Fire Ins. Co. v. Kroegher, 83 Pa. St. 64, 67.]

⁴ [Liverpool, &c. Ins. Co. v. Van Os, 63 Miss. 431, 441.]

⁵ [Pottsville Mut. Fire Ins. Co. v. Fromm, 100 Pa. St. 347.]

⁶ [Wilkins v. Mut. Reserve Fund Life Ass., 54 Hun, 294.]

was a mistake of the agent, he being only authorized to make surveys and receive applications, the company approving the risks. The minds of the contracting parties never met.¹

[§ 144 G. **Discussion of the Effect of the Agent's Knowledge.** — How far the knowledge of an insurance agent ought to affect the company is a very serious question, as the cases in the foregoing sections make manifest. Given a company dealing through A. with C., what effect is to be given to A.'s knowledge? That is the problem. The object of the law as regards commercial life is to repress bad faith and negligence, and favor good faith, certainty, and facility of doing business. This it accomplishes by throwing the consequences of evil on the wrong-doer, and securing the natural results of good conduct to the "conductor," if we may warp that word to the occasion, and, where necessary for the protection of society from the acts of those employed by others and not of themselves sufficiently responsible, the law holds the employer. It is all a matter of judgment and common sense, and the sole question is what arrangement will be best for society all things considered. Coming to the question before us with this principle in mind, —

1. It is clear that if the insurer himself knows the fatal fact F., and afterward recognizes the contract of insurance as valid by receiving premiums, making assessments, &c., he should be held; good faith and certainty require it. Were it not for being lulled into security the insured would not uselessly pay out his money, but would procure new insurance.

2. It is equally clear that if the insurer I. himself does not know the fact F., and the insured C. does know it, and has good reason to believe that I. does not, C. should reap the appropriate harvest of his bad faith in the loss of the contract, no matter what A.'s knowledge may be. This covers cases of collusion between C. and A., and cases in which C. warrants or represents to the company an untruth, although known to the agent to be untrue.² If A. knows the fatal fact F., but through fraud or negligence does not

¹ [Sanders v. Cooper, 115 N. Y. 279.]

² [See § 133 B.]

inform I. of it, and C. is ignorant of I.'s ignorance, has acted properly informing A. correctly, in all respects conducting himself in good faith, and is guilty of no greater negligence than is involved in relying on A. to do properly the business entrusted to him by the company, and failing to check his work by reading the application and policy, or get some reliable person not adversely interested to read it for him, *then* the question of loss as between I. and C. is one of difficulty.

It may be said, on the one hand, that it is a very small matter for each person to read the papers or have them read, that the company cannot test the character or govern the action of its agents all over the world, and that it is entitled to this slight aid from the public to help it keep the agents straight. And it does seem a great hardship on a company to make it pay thousands of dollars on a risk it might never have taken but for a falsehood or misstatement in a paper signed by the assured without reading. The agent in writing the application is really doing the assured's part in the negotiations, and the latter knows that the whole contract is to be based upon that application. He knows also that the agent is liable to error, and open to temptation to defraud, and he should as a prudent man read the papers. On the other hand, it may be said that the company selects the agent to do *its* work. He is under its command and subject to its discharge. The profits of the business done by him belong to it. The assured has no control over him, and is invited by the company to rely on him. It is the widespread custom to give the agent the facts verbally, and leave him to write the application, and certainty and facility of doing business require that the public should be protected in this its chosen manner of dealing. It would open the doorway to the grossest frauds, if the insurer could escape liability because of some misstatement or omission made by its own agent, perhaps intentionally to secure gains to the company without risk, relying on the well-known habit of men to sign the application without investigation.

On the whole it seems to me there is a distinction between

cases where the agent has (or is held out as having) full discretion to contract just as if he were himself the company, issuing policies without referring the risk to the home office, and cases in which the agent is not properly supposed by the assured to have any greater power than to solicit insurance and take the facts, forwarding them to the home office, where the assent is really given.

In the first class of cases the company should be held. The general agent, so far as C. is concerned, is the company itself, just as much as the secretary in the home office is in the other class of cases. The contract is exactly the same as if A. were I.; the case falls under our first division. If a right of cancellation is reserved if the home office should, after knowing the facts, conclude that it desired to retire from the contract made by its general agent, then, as to furnishing the basis for such conclusion, the application would fall under the principle of the second class of cases.

Where the assured knows that the decision rests with another than the agent he is talking with, he ought to exercise proper care that the facts should go correctly to that other. If he gives the facts verbally to the agent, and the company issues a policy without requiring a signed statement, and without writing the answers as a part of the policy, of course no court would make the assured responsible for errors of the agent in transmitting his answers to the company. If, however, the assured signs an application or receives what purports to be a copy of his answers in or with the policy as part of the contract, he ought certainly, speaking absolutely, to read the papers and see that they are right. - Who would think of signing a deed or a bond without knowing its contents? Yet a policy may be as valuable as a deed, and more valuable than a bond if the obligor goes to Canada. *Absolutely* he ought to read, but *relatively* to the company does he owe this duty in such sense as to free it if he does not? If we give the assured the money, negligence escapes its punishment entirely, and the public will go on being negligent, and more unjust contracts will be made for lack of a little care on the part of the assured. If we allow the

company to keep the money, we open a way to corruption, and put a heavy loss on an almost innocent party who has given value in good faith. *Justice would give the assured his premiums and interest from the company, and the rest of his loss from the agent.*

It will not do to decide the question before us by referring to the rule that parol is inadmissible to vary a written contract. It can have no place at all, unless the application is made part of the policy. The principle is intended to do justice, and not evil. It never should be appealed to, to enable a party to take advantage of his own wrong. In the very jurisdictions where it is used as decisive of the matter under discussion, it continually gives way in cases of fraud, duress, mistake, &c. Anything showing that the contract is not the one made by the parties is admissible. Parol ought to be admitted to show that the agent did not correctly take down the insured's answers, — that the application is not the instrument of the assured, — to prove that the minds of the parties never met on the contract as set down in the policy and application. To avoid the contract and resist the payment of premiums there is no sort of doubt that the insured should be allowed to do this; but when the request is not only to declare the supposed contract off, but to substitute a new one, holding the company to a risk it did not understand, which fact the insured had easy means of knowing, then the question is not one of the admission of parol to show that a different contract was actually made, but to show that the minds of the contracting parties really did not meet at all. I am speaking of course of the second class of cases, in which the agent is only a solicitor and forwarder. It is a serious thing to ask a court to hold the company on a contract it never made. To be sure, the company invites the public to deal with its agents in the customary manner, and it knows that it is usual to rely on the agents, and the amount of litigation on the subject is alone sufficient proof of the frequency with which men trust them. Perhaps it might be deemed fair to hold the company to pay the loss.

But I am inclined to think that where there is no ground for believing that the company connives at the wrong of the agent, the insured who has neglected to read his statement, should get no more than his premiums and interest, after deducting the additional premiums and interest on them, which the assured would have had to pay if the representations had been correct, unless the risk is one the company would not have taken at all if the facts had been known to it, and this is apparent on the policy. Then the assured should only recover from the company his premiums and interest, if his negligence in not reading the papers has caused the trouble. In such cases the minds of the parties never met to the effect that there shall be *any* insurance at all.

Neither will it do to refer to the rule, firm and good as it is in its place, that the knowledge of an agent is that of his principal,¹ as entirely conclusive of the matter. If the insured knows that the agent does not communicate his knowledge to the company, it is certain that its equity is better than his, and if he might know it by ordinary care, and the insurer has not been negligent but has supplied him with proper means of knowing the true state of things by a glance (and the very fact of requiring his signature is notice that the company relies on him, not on the agent), it seems equally clear that his equity is less than that of the company, and that he should have an action only against the agent for loss and against the company for his premiums. The only adverse consideration being that if he is allowed to hold the company it can in turn hold the agent, and having dealings with him will be better able perhaps to turn the screws upon him, and so bring the real offender to justice, than if it is left to a suit against him by the assured. Special facts may exist which make the particular case very clear. Wherever the agent so manœuvres as to deceive the company, and at the same time place it beyond the power of the insured by ordinary care to discover that he has done so, — and in any case where reading the papers would not give the insured notice that the company was not informed truly,

¹ [See § 122, note.]

—the troublesome element of negligence on the part of the assured is removed, and the principle that as between two innocent parties he who enables a third person to cause loss must bear it, seems to decide the question against the company. There is no consideration to break the identity of principal and agent. Such a case occurred in Iowa. Where the agent fraudulently misstated the age of the assured, forged a physician's certificate, and changed the policy while in his hands for delivery so as to show the true age, and the insured knew nothing of these acts, the company is bound.¹

So if the agent advises the assured that certain matters need not be stated, and he as a man of ordinary prudence and intelligence relies on the agent's assurance, he will be protected.² If the applicant cannot read, and so relies on the agent's assurance that the application is a truthful transcript of his answers, it is perhaps asking too much to expect him to take a friend with him, or get some disinterested person to read it to him; though it is difficult to see how the company's equity is the less because the plaintiff cannot read, or how one who writes a paper for the assured, or reads it to him, — a paper to which the assured signs his name, — can be agent of any one but the assured in so doing, unless the agent is in connivance with the company. And there seems to be a general feeling running through the cases that insurance companies are a set of rascals, who wink at and encourage the tricks of agents upon the public. A series of such acts not resulting in discharge of the agent, or even a single flagrant case, would raise a strong suspicion that the company was the real deceiver, especially where there is no motive in defrauding an applicant except to secure unjust profits for the company. I believe that this feeling is the real basis of many of the decisions, and where it is well

¹ [McArthur v. Home Life Ass., 73 Iowa, 336.]

² [When the assured told the agent that he had sunstroke, and the latter told him it was not necessary to say anything about it, the company is estopped from setting it up in defence. Boos v. World Mut. Life Ins. Co., 6 T. & C. 364, 367. See § 120.]

Other cases of peculiar facts will be found in the foregoing sections, 132 to 134, and 144 *et seq.*]

founded, the estoppel put upon the company is certainly just. But where there is no reason to suppose the home office to be other than fair and honest, and there are no peculiar facts in the case, it does seem that one who in dealing with a mere soliciting agent signs his name to an application without reading it, ought, as between the company and himself, to abide by the contents of it. There being no usage or special evidence to the contrary, *the very fact that his signature to the paper is required is notice to him that the company does not rely upon the agent, but requires the applicant's own authority.* What would be the use of signing a statement, if the parties understood that the solicitor was the company's agent to ascertain the facts and state them to the company? The requirement of a signed application is clear proof that the company wishes to have the facts in the assured's own words, or in words that he adopts. It is perfectly fair, and calculated to save misunderstanding and trouble, that they should have such an authoritative statement, and the assured by signing the application impliedly says to the company that it is his. The agent in writing the answers is not doing the work of the company, but of the assured, just as much as if a stranger wrote at his dictation. Soliciting agents are not under the immediate supervision and control of the home office. They resemble independent dealers much more than servants. In many respects their position is very like that of any ordinary broker to whom one might go to place insurance. Their interests are often adverse to those of the company, leading them to color the facts so that the company will accept the proposal, and they will get their commissions, — an additional reason why the company may expect the applicant to take care that the statement signed by him is a true one. It is said in some cases that if the policy provides that the assured adopts and warrants the application, or that no statement to the agent not transmitted to the company in the application should bind it, omissions and errors of the agent in filling out the statement would be those of the assured. But if the assured is not obliged to read his

papers, how is he to be supposed to know these conditions, or any others for that matter? It seems clear that I., if honest and fair, should not be held for an omission or error, of a really substantial nature, whether made by the assured, or by the agent through mistake or otherwise in filling up an application from his answers, *and which the assured might have discovered if he had taken the trouble to read the statement he signed.* The words of the United States Supreme Court in § 145 A. commend themselves as solid sense. At the same time, the plaintiff being innocent of any intended wrong, he should recover his premiums and interest; and companies would probably find it to their advantage to make the same terms after an honest loss, as they would have made before loss if the application had been correct. Indeed if the rules of the business should crystallize sufficiently to make it certain what contract the company would have made on the true state of facts, the law might recognize the custom, and refuse to allow the company to recede after loss from a contract it is certain they would have made before loss, the plaintiff being innocent of wrong intent, that is, many errors would become immaterial except to vary the premium, and the difference in this respect could be taken out of the amount payable on the policy.¹ If on the true statement the risk is no greater than on the false one, the company has nothing to complain of, and should be held.

In the case cited in § 144 from the United States Supreme Court, the applicant told the agent that she did not know anything about the cause of her mother's death or her age at the time, but while the agent was taking the application there was present an old woman who claimed to know about the matter, and the agent filled in the answers she gave without assent of the plaintiff or his wife, whose life was being insured. When the application was signed the insured did not know how the answers to the disputed questions had been filled in, and the court held, as we have seen, that the company was bound, and it should have been. If the insured had read the statement he could have discovered

¹ [See § 138 B. for a tendency in this direction.]

nothing different from what had actually passed, and if the agent, who must be supposed to know all about the business he is engaged in, deems it proper to insert the answer of some third person, it would probably never occur to recently freed slaves, as the insured and his wife were, to question the correctness of his action, or to request that the answers in question be so marked as to indicate that their signatures to the statement as a whole did not apply to sanction the said answers.

It makes no difference that the policy declares the agent to be the agent of the assured, not of the company. For whom a person is acting is a matter of law on the facts of every case.¹ The application precedes the policy, and to hold that a provision in the aftercoming policy unknown to the assured at the time of application could turn the insurance agent into *his* agent, when he thought all the time he was dealing with him and accepting his advice as agent of the company, would be an outrage.

If an agent says he is authorized to make surveys, &c., measures the distances between the property of the assured and surrounding buildings, and makes a plan, marking upon it the said distances, and the assured signs the whole application without testing the distances, the company ought to be held, if the agent although only a solicitor really did have authority to make the measurements himself, and was not expected by the company to do it in the presence of the assured; that is, if the company understood that the measurements were to be taken on the authority of the agent and not of the assured, although over the latter's signature. And a usage would be good evidence in the matter.²

If the agent making out the application is not the recognized agent of the company, of course he acts only for the assured, and the latter is bound by his acts.³

Where the applicant reads the statement and, on noticing

¹ [Union Mut. Life Ins. Co. v. Wilkinson, 13 Wall. 222; Comm. Fire Ins. Co. v. Ives, 56 Ill. 403.]

² [Plumb v. Cattaraugus Co. Mut. Fire Ins. Co., 18 N. Y. 392.]

³ [Foot v. Aetna Life Ins. Co., 4 Daly, 285.]

that it contains omissions or changes, is assured by the agent that it is all right, that the variances from the verbal statement make no difference, the company is properly held bound by the representation of its agent, unless the assured knows or ought to know that the representation is not true. If the assured feels in his heart that it is not all right, the company is really being cheated by the agent and the assured putting their heads together, the one to get his commissions on a shady risk, the other to get his insurance, and at as low a premium as possible.

So where the physician told the agent that the person whose life was to be insured was temperate now, but that he would have to answer the question "Has he always been temperate?" in the negative, and the agent told the doctor to leave a blank after that question, saying that it was a mere matter of form any way, and the doctor did so, and signed the statement in that condition, and the evidence tended to show that the agent had afterward without authority filled in a wrong answer to the question, it was properly held that the company was bound.¹ If the statement had been left as the physician made it and the company had issued a policy, it would have waived the blanked question. The doctor had been guilty of no negligence at all. The whole fault was that of the agent, and the company ought to be held. But the decision is not placed on the true ground of the fault of the agent, beyond the reach of ordinary care on the part of the doctor. On the contrary the broad doctrine is asserted that the company is conclusively presumed to know what the agent knows at the time of making the application. This stretching of decisions beyond their facts is what has given rise to the difficulty in this as in many legal questions. In nearly all of the cases, particular facts will be found which justify the judgment, but make the case fall short of being an authority for the rule laid down by the courts in most of the States, to the effect that facts known to an agent (not limiting it to general agents making contracts) contrary to the statements signed by the applicant

¹ [Miller v. Mutual Benefit Life Ins. Co., 31 Iowa, 216 ; s. c. 1 Ins. L. J. 25.]

bind the company, even though the company is to receive the statements on the authority of the applicant, and by reading the application he might have saved all trouble. The true rule is, that (where there are no special facts, such as connivance by the company, impossibility or improbability of discovering the error or saving the fraud even if the paper had been read and due care exercised, advice or assurances of the agent, or acts equivalent thereto, that the assured could not be expected to know were not proper and in good faith, a usage to let the agent make surveys on his own responsibility, &c.), a person is bound to know what he signs, and if by lack of ordinary care in not reading under the circumstances, as by not reading the paper, he misleads the company, he ought not to throw the loss upon it, and should have no more than his premiums and interest. If he acted in *bad faith* he should have nothing. But if he acted in good faith and with ordinary care the company should bear the burden of its agent's acts and omissions.]

§ 145. **Courts of Massachusetts and Rhode Island more Strict.** — But the courts of Massachusetts and Rhode Island, notwithstanding the admitted hardship of the case, have refused to yield to the strong equity of the claim of the assured under like circumstances. Looking upon the attempt to show by parol evidence that the facts untruly stated, or carelessly or incautiously omitted, were known to the insurers or their agent when the policy was issued, as a direct violation of the rule that parol evidence cannot be admitted to contradict or vary the terms of a written agreement, they have persistently excluded such evidence, even in cases where the insurers were notified by the insured, and assented to the omission. Thus, a failure to mention in the application the fact that part of the premises insured was used as a grist-mill, the same being included in a memorandum of special hazards, the neglect to mention which involved a forfeiture of all rights under the policy, was held to be fatal to the claim of the assured, though the agent was fully authorized to make contracts of insurance, without reference to the company for its sanction, and examined the property,

saw the grist-mill, agreed and suggested what was material to be stated, and in fact filled up the application himself.¹ And the same doctrine has been repeatedly held where the insurers themselves had knowledge of, and assented to, the fact which was afterwards allowed to be set up as a defence to the claim of the insured.² They hold with equal strictness that agents of mutual insurance companies employed by them to procure and forward applications, and authorized to receipt for premiums, although it is their custom to fill up the applications and make such explanations as may be necessary, are nevertheless generally to be regarded as the agents of the applicants also, at least so far as to make the applicants responsible for the statements contained in the application. The mistake of the agent is their mistake; and though in point of fact the answer or statement was truthfully and accurately made to the agent, and if set down as given would have been correct, yet if, by inadvertence or infirmity, it is untruly set down, a court of law must hold the applicant to the terms of his contract, and cannot admit evidence to show that it was really different from what it appears to be.³ Where the agent acting for the company was required himself to answer the question, "whether your answers by the applicant are correct," this implies that it

¹ *Lee v. Howard Fire Ins. Co.*, 3 Gray (Mass.), 583. See also *Southern Mut. Ins. Co. v. Yates*, 28 Grat. (Va.) 585.

² *Barrett v. Union Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 175. [Such a decision certainly carries the rule in regard to parol beyond all reason and justice.]

³ *Homes et al. v. The Charlestown Mut. Fire Ins. Co.*, 10 Met. (Mass.) 211; *Jenkins v. The Quincy Mut. Fire Ins. Co.*, 7 Gray (Mass.), 370; *Wilson v. Conway Mut. Fire Ins. Co.*, 4 R. I. 141; *Barrett v. The Union Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 175; *Kibbe v. Hamilton Mut. Ins. Co.*, 11 Gray (Mass.), 163; *Abbott v. Shawmut Mut. Fire Ins. Co.*, 3 Allen (Mass.), 213. So in Ohio, *Smith v. Farmers' Mut. Ins. Co.*, 19 Ohio St. 287; and in New Jersey, *Franklin Fire Ins. Co. v. Martin* (N. J.), 8 Ins. L. J. 134, where this view of the case is argued at great length, and the cases to the contrary, including *Insurance Co. v. Wilkinson*, *ante*, § 144, criticised. In Pennsylvania, also, a tendency to a like strictness has been shown. *Smith v. Insurance Co.*, 24 Pa. St. 320; but see *contra*, *Spring Garden Ins. Co. v. Scott*, Phila. Leg. Int., March 14, 1870, and *post*, § 148 *et seq.* And in Kentucky, *Prot. Ins. Co. v. Hall*, 15 B. Mon. (Ky.) 411. So in the Dominion courts. *Martin v. Mut. Fire Ins. Co.*, 3 Pugsley (N. B.), 157; *Dingee v. Agr. Ins. Co.*, *id.* 80; *Kennedy v. Agr. Ins. Co.*, 1 R. & C. (Nova Scotia) 433; *Billington v. Provincial Ins. Co.*, 2 Ont. App. 158; s. c. 3 Can. Sup. Ct. Rep. 182.

was his duty to write the answers of the applicant, and for his negligence, fraud, or mistake, which the insured may prove, the company will be held responsible.¹

And in a later case in Massachusetts, where the premium had actually been paid to the agent of the company, but was not paid over or tendered to the company until eight days after the date of the policy, and after the loss, the policy providing that every agent forwarding applications, or receiving premiums, is the agent of the applicant and not of the company, reaffirms the doctrine of the above cases, and denies the authority of the agents and officers of a mutual insurance company to waive the by-laws and provisions which relate to the substance of the contract, adopted by the members of such company for their mutual protection.² Nor has such an agent authority to perfect the contract in behalf of the company, especially if the receipt specifies that the premium is to be refunded if the office does not approve; a sufficiently clear intimation, it seemed to the court, of the agent's want of authority to make the contract.³ Nor is the delivery of a new premium note to him by the assignees, after an alleged transfer of the policy, where the validity of the assignment depends upon the question whether the company at the time of their assent had knowledge of the delivery of the note, a delivery to the company so as to affect them with knowledge of the fact.⁴ Nor can an agent to take and transmit policies, to whom the insured surrenders his policy for cancellation, bind the company by his promise to deliver up the premium note, although the policy be actually cancelled. The cancellation of the policy does not relieve the note from liability to assessment for losses prior to the surrender, and the agent is clothed with no authority to give

¹ *Smith v. Farmers', &c. Ins. Co. (Pa. St.)*, 8 Ins. L. J. 828; *Eilenberger v. Protective Mut. Fire Ins. Co. (Pa. St.)*, 8 Ins. L. J. 822.

² *Mulrey v. Shawmut Fire Ins. Co.*, 4 Allen (Mass.), 116. In the cases above cited from the 10th of Met. and 7th of Cush., it is intimated that equity might relieve in such a case; and so it undoubtedly will. See also *Wilson v. Conway Mut. Fire Ins. Co.*, 4 R. I. 141.

³ *N. Y. Union Mut. Ins. Co. v. Johnson*, 23 Pa. St. 72.

⁴ *Fogg et als. v. Middlesex Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 337.

up the securities of the company.¹ It is doubtful whether the company itself could surrender the note under such circumstances. This might be tantamount to a wilful omission of the note in calculating the assessment, and if so, it would vitiate the assessment.²

But if the agent sends in an application which was never authorized, instead of a defective application which was authorized, the company will be bound as if no application was ever made, if the policy be issued upon the first, or, if upon the last, then they will be bound if the defective application be good so far as it goes.³ The applicant is bound by an application which he authorizes, though he may not know its contents.⁴

[§ 145 A. In a case in the United States Supreme Court, A. applied for insurance on his life, and answered all material questions orally and correctly. The agent set down false answers and A. signed the application without reading or knowing its contents. The policy issued thereon was conditioned that the answers were part of it, and *that no statement to the agent not thus transmitted should be binding on his principal; and a copy of the answers with these conditions conspicuously printed upon it accompanied the policy.* It was held that the policy was void. "It was the duty of the applicant to read the application he signed. He knew that upon it the policy would be issued if issued at all. It would introduce great confusion in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, could be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity."⁵ This seems to be sense and law. No rule relieving one party to a contract of the duty to exercise ordi-

¹ Marblehead Mut. Fire Ins. Co. v. Underwood, 3 Gray (Mass.), 210.

² Post, § 558.

³ Blake v. Exchange Mut. Ins. Co., 12 Gray (Mass.), 265.

⁴ Draper v. Charter Oak Ins. Co., 2 Allen (Mass.), 569.

⁵ [N. Y. Life Ins. Co. v. Fletcher, 117 U. S. 529.]

nary care and prudence is recognized in regard to any other sort of negotiations, and I see no reason why it should be applied merely to contracts of insurance. It surely is not prudent to sign what another has written without reading it. If the agent had altered the application after A. had once made sure it was right and signed it, the case would wear a different aspect. Where the insured agrees to make his answers the basis of the contract and declares them true, any falsity, conscious or not, will avoid the policy. Such answers are warranties.¹ In case the application is made part of the policy and it is provided that any untrue answers will avoid the contract, no action will lie against the company if there is an untrue representation, although it was made by the agent without the knowledge of the applicant who had orally stated the truth to the agent. Oral evidence will not be admitted even to show that the company knew that the representations were untrue when it issued the policy.² This is carrying the rule against parol to an absurd length. All rules of law were framed for purposes of justice, and to so construe them as to forward iniquity is to use them to defeat the very purposes they were designed to accomplish. Where A. applied for insurance telling the agent that there was other insurance on the property in the Gore Mutual, but he did not know how much, and intrusting it to the agent to find out the amount and state it to the company, and the agent made out the application without mentioning the other insurance, it was held that the company was not estopped, and that the policy could not be reformed.³

§ 146. **So as to the Power of Officers of Mutual Companies.** — And in Massachusetts the officers of mutual insurance companies are held to the strictest compliance with the requirements of the by-laws, and limited to the exercise of such powers as are thereby conferred. Mutual insurance, it is truly observed, is essentially different from stock insurance,

¹ [Weems v. Standard L. Ass. Co., 21 Scot. L. R. 791. See also Id. 453.]

² [McCoy v. Metropolitan Life Ins. Co., 133 Mass. 85; Batchelder v. Queen Ins. Co., 135 Mass. 449.]

³ [Billington v. Provincial Ins. Co., 3 Can. Supr. Ct. R. 182.]

and much of the litigation that has grown out of this species of insurance has been owing to inattention to this difference. Its original design was to provide cheap insurance by means of local associations, the members of which should insure each other. Such associations are in their nature adapted only to local business. They need many by-laws and conditions that are not required in stock companies; and it is necessary and equitable that each person who gets insured in them should become subject to the same obligations towards his associates that he requires from them towards himself. If the officers have discretionary power as to the terms of the contract, or even as to its form, it is obvious that different parties may become members upon different terms and conditions, and thus the principle of mutuality will be completely abrogated. When the company have once determined the forms in which their policies shall be made, and the conditions upon which they are willing to contract, it is nothing less than a violation of duty for the officers to undertake to bind the companies they represent by other and inconsistent contracts, parol or otherwise.¹ Hence where the by-laws of a company provide that subsequent insurance obtained, and subsequent alterations made, without the consent in writing of their president, shall avoid the policy, the verbal consent of the president is unauthorized.² Nor when the by-laws require that the premium shall be paid before the policy shall take effect, has any officer the power to bind the company by an agreement that notwithstanding the non-payment of the premium the policy shall be effected.³ Nor to estop the company by a representation that insurance has been obtained, when in fact the premium has not been paid.⁴ For the same reason, where the charter provides that an applicant shall deposit his note before he receives a policy, no officer can waive the condition by an assurance that the risk shall commence immediately and before the policy is

¹ *Evans v. Trimountain Mut. Fire Ins. Co.*, 9 Allen (Mass.), 329.

² *Hale v. Mechanics' Mut. Ins. Co.*, 6 Gray (Mass.), 169.

³ *Brewer v. Chelsea Mut. Fire Ins. Co.*, 14 Gray (Mass.), 203.

⁴ *Baxter v. Chelsea Mut. Fire Ins. Co.*, 1 Allen (Mass.), 294.

issued.¹ The same rule, however, does not apply where the provision for the prepayment of the premium is not a condition, or by law or otherwise a part of the policy, but is a merely collateral agreement appended to the application. In such case the prepayment of the premium may be waived by any officer or agent the general scope of whose duties gives him a right to act in the premises.²

§ 147. **This Rule applicable only to By-laws which are of the Essence of the Contract.** — But the courts of Massachusetts make a distinction between by-laws and provisions which go to the substance and essence of the contract and those which do not. Of the latter class are stipulations as to preliminary proof of loss. As these relate only to the form or mode in which the liability of the company shall be ascertained and proved, and must necessarily be submitted to the officers of the corporation, who must pass upon their sufficiency; and as, furthermore, in ascertaining and settling losses, they frequently act upon personal investigations made by themselves or their agents, thereby obtaining knowledge which renders the preliminary proof wholly immaterial, it is held to be within the scope of their authority to say when the proof is sufficient, and if they deem it expedient, to dispense with the literal requirements of the by-laws in this particular.³ But a mere statement by an agent, after notice to him of loss, "that the matter would be all right with the company," does not relieve the party insured from the necessity of making his preliminary proof;⁴ nor does the mere fact that the agent resided at the place of the fire, and personally knew all the circumstances attending it.⁵

§ 148. In Pennsylvania, also, the distinction between mutual and stock companies is regarded as essential. In

¹ *Belleville Mut. Ins. Co. v. Van Winkle*, 1 Beasley (N. J.), 333.

² *Sheldon v. Conn. Mut. Life Ins. Co.*, 25 Conn. 207.

³ *Priest et al. v. The Citizens' Mut. Fire Ins. Co.*, 3 Allen (Mass.), 602, 605. The case of *Dawes v. North River Ins. Co.*, 7 Cowen (N. Y.), 462, does not advert to this distinction, and cannot now be regarded as sound law.

⁴ *Boyle v. North Carolina Mut. Ins. Co.*, 7 Jones, Law (N. C.), 373. And see *post*, § 471.

⁵ *Smith v. Haverhill Mut. Fire Ins. Co.*, 1 Allen (Mass.), 297.

the case of *Hackney v. The Alleghany Mutual Insurance Company*,¹ the question of the responsibility of mutual insurance companies for the unauthorized and false declarations of their agents arose under the following facts. The agent of the company bore a certificate of the fact of his agency, signed by the president of the company, and authorizing him "to receive applications for insurance and the premium thereon." In defence it was proposed to prove that at the time the agent requested the plaintiff in error to become a member, he represented that the company was not insuring in the city of Pittsburg and other large cities, and that upon this representation the premium note was given. But the court held that the evidence was rightly rejected, as the declarations of the agent were not within the scope of his authority, which extended only to receiving applications and premiums. And had the declaration been made by the president himself, it would not have been binding upon the company; for, say the court, "there is no such privity among the corporators or the officers of the company as to make the admission of either binding upon all. If such verbal conversations were admitted in evidence against the written engagements of the corporators, their policies would be worthless, and the utility of mutual insurance companies at an end."

§ 149. In the same State it has also been held, upon grounds which would seem to be sufficient without relying upon the distinction, that where the insurance is in a mutual office, and the agent of the office fills up the application, itself expressly made a warranty, and, with the knowledge of the assured, states what is by both of them known to be material and untrue, as, that there is a chimney and stove well secured, with the pipe passing through a crock well secured, when, in fact, there is neither chimney nor stove, the misstatement will be fatal; nor will it be excused by an agreement, not communicated to the company, between the agent and the assured, that, before a fire should be kept in the building, a chimney should be erected and the stove-pipe

¹ 4 Barr (Pa.), 185.

secured as represented. Such an agreement the agent clearly has no authority to make.¹ In this case the case of *Howard Insurance Company v. Bruner*² was referred to and distinguished. "That," said the court, "was not a mutual company. The agent who wrote out the description, instead of being limited to a mere reception of applications, was clothed with large powers, settled the terms of insurance, and countersigned and issued the policies without referring applications to the company. Under the circumstances . . . we held that the written survey was the act of the agent, and that the assured was not to be prejudiced by the omission of facts which he stated but which the agent omitted to set down." Reference was also made to *Susquehanna Insurance Company v. Perrine*,³ in which the applicant was held responsible for the omissions of the agent, stress being laid upon the fact that the company was a mutual one, and by one of its by-laws made the applicant responsible for the agent's accuracy in making the survey. Yet in that case Gibson, C. J., said: "A regulation established by a by-law is not obligatory on a stranger; and, if the plaintiff were such, he would not be affected by the blunder of the company's surveyor, notwithstanding the terms of application prescribed by the conditions of insurance;" a doctrine which is in harmony with *Howard Insurance Company v. Bruner*.⁴

§ 150. But in Pennsylvania, where insurance was effected by the agent of a stock company upon "barley and malt in assured's malt-house and brewery," subject to the condition that if the risk was increased without notice to the company and an indorsement of consent on the policy, the policy should be of no force, and notice was given, before the execution of the policy to the agent of the company, that the insured intended to distil and store whiskey in the buildings containing the property insured, during the currency of the

¹ *Smith v. Cash Mut. Fire Ins. Co.*, 24 Pa. St. 320.

² 11 Har. (Pa.) 50.

³ 7 W. & S. 348.

⁴ 11 Harris, 50. In fact, the latter case was tried before that distinguished judge, and the ruling excepted to and sustained was his ruling. See also *ante*, § 132, and *Moliere v. Pa. Fire Ins. Co.*, 5 Rawle, 342.

policy, it was held, that although there was no indorsement of the consent, the company had, through notice to its agent, knowledge that distilling had been added to the business of brewing before the policy issued, and consequently this was one of the risks which they intended to insure against, and therefore no indorsement was necessary.¹

§ 151. **General Agent with Unlimited Powers.** — A general agent, there being no limitation of his authority, may even by an oral agreement extend the scope of a policy already issued, so as to make it cover property not embraced in the policy when issued, such policy being an open one and intended to cover property of a certain character, which might be at risk at different times, the property being of the general character of that insured in the original policy. And his oral agreement will bind the company, although the policy purports to be upon property "as per indorsements to be made thereon," and there is no indorsement of the property which the agent verbally agrees to insure.² And he may correct an error in the policy after its issue;³ or make the policy, by its terms non-assignable without the company's consent, payable in part to a third person by an indorsement to that effect upon the policy.⁴

So a resident general agent for a foreign insurance company, whether appointed under a statute requiring a general agent upon whom service of process may be made or not, having the general charge of the business in the State where he resides, has power to waive the conditions of the policy as to preliminary proof of loss.⁵ And, in the absence of evidence of limitation of his powers, any acts within the general scope of the business will bind the company.⁶ (a)

¹ *People's Ins. Co. v. Spencer*, 53 Pa. St. 353. And see *ante*, § 148.

² *Kennebec Co. v. Augusta Ins. & Banking Co.*, 6 Gray (Mass.), 204.

³ *Warner v. Peoria Mar. & Fire Ins. Co.*, 14 Wis. 318.

⁴ *Newman v. Springfield Fire & Mar. Ins. Co.*, 17 Minn. 123.

⁵ *Eastern Railroad Co. v. Relief Ins. Co.*, 105 Mass. 570.

⁶ *Imperial Fire Ins. Co. v. Murray*, 73 Pa. St. 13.

(a) The restrictions inserted in a policy upon the power of a general or other agent to waive any conditions, unless done in a particular manner, do not apply to those conditions which relate to the inception of the contract,

He may also waive a condition making the validity of the

when the agent delivers it and receives the premiums with full knowledge of the actual situation. *Forward v. Continental Ins. Co.*, 142 N. J. 382; *Wood v. American F. Ins. Co.*, 149 N. Y. 382, 385. When general agents have authority to make contracts without reference to the home office, or have blank policies signed by the president and secretary of the company, their power to waive conditions in the policy is co-extensive with that of the company itself, and with the requirements of the business at the given time and place. *Berry v. American Central Ins. Co.*, 132 N. Y. 49; *Parker v. Citizens' Ins. Co.*, 129 Penn. St. 583; *Howard Ins. Co. v. Owen*, 94 Ky. 197; *Coles v. Jefferson Ins. Co.*, 41 W. Va. 261; *Washington L. Ins. Co. v. Menefee* (Ky.), 29 Ins. L. J. 118; *Hahn v. Guardian Ass. Co.*, 23 Oregon, 576; *South Bend Toy Manuf. Co. v. Dakota F. & M. Ins. Co.*, 3 So. Dak. 205. Revocation of such agents' authority without notice does not take away their power to contract with those who have no knowledge of the revocation. *Marshall v. Reading F. Ins. Co.*, 78 Hun, 83. See *Greenwich Ins. Co. v. Sabotnick*, 91 Ga. 717. This applies, *e. g.* to an agent's permit for removal of goods. *Burlington Ins. Co. v. Threlkeld*, 60 Ark. 539. One whom the insured authorizes to act as a soliciting agent only, without power to issue policies or waive their provisions, is not a general agent. *Martin v. Farmers' Ins. Co.*, 84 Iowa, 516; *Godfrey v. New York L. Ins. Co.*, 70 Minn. 224; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233, 248, note.

General agents may delegate to their clerks and sub-agents the powers to act for them which are within the scope of their own authority. *Goode v. Georgia Home Ins. Co.*, 92 Va. 392; *Bergeron v. Pamlico Ins. Co.*, 111 N. C. 45; *Boren v. Manhattan L. Ins. Co.*, 99 Ga. 238; *McGonigle v. Susquehanna Mut. F. Ins.*

Co., 168 Penn. St. 1; *Harding v. Norwich Union F. Ins. Society*, 10 So. Dak. 64. See *Graham v. Fire Ins. Co.*, 48 S. C. 195. General agents with authority to adjust a loss may waive conditions of the policy. *Georgia Home Ins. Co. v. Allen* (Ala.), 28 Ins. L. J. 199; *Phenix Ins. Co. v. Munger*, 49 Kansas, 178; *German Ins. Co. v. Gray*, 43 id. 497. In a late Massachusetts case, it was held that a person who for many years has been held out by an insurance company as a general agent to negotiate contracts of insurance and agree upon all the terms of the contract, and for that purpose is furnished with policies executed in blank by the president and secretary of the company, with authority to fill up and deliver the same to any person with whom he has made a contract, is authorized to make a preliminary contract to insure, binding upon the company, to be consummated by filling up and delivering a policy pursuant thereto; that conversations with the alleged agent of an insurance company at the time when a contract to insure property was made are admissible, in an action for breach of the contract, to show what the contract was, and it is within the discretion of the judge to admit them before proof of the agency; and a conversation after the loss, in which the plaintiff informed the agent of the loss and asked him for the policy, and the agent replied that he did not have the policy or any record of it, is also admissible; that the fact that a person acting as agent of an insurance company did not submit the risks taken by him to the company for its approval before he wrote and delivered the policies is admissible, in an action against the company for breach of a contract made by him to insure property, as bearing upon the nature of his authority; and that private instructions given by an insurance company to its agent, and not communicated or known to a person with whom he makes

policy dependent on the prepayment of the premium.¹ So he may waive a breach of the condition of the policy requiring notice of other insurance, by delivering a renewal receipt, signed by the president and secretary, and accepting the premium after knowledge of the breach, though the receipt by its terms is not to be effectual unless countersigned by the agent;² and he may give credit for the renewal premium, or take a note therefor, and bind the company by parol, though he hold such receipt,³ and waive a requirement that the policy to be valid must be countersigned by him,⁴ or a condition that suit shall be brought within a certain time after loss,⁵ or that repairs shall not be made, or the house left vacant, without consent of the insurers indorsed on the policy.⁶

§ 152. **Notice to Agent when Notice to Principal.** — If, when notice to the company is required of any particular fact, the notice be given to the board of directors, or to any officer or agent of the company whose duty it was (under the by-laws, resolutions, and usages of the company, or of the business), upon receiving such notice, to communicate it to the company, or to any persons from whose relation to the company third persons might fairly infer such duty, this will be a sufficient compliance with the requirement.⁷ Notice to an agent appointed to receive and forward applications

¹ *Boehen v. Williamsburgh City Ins. Co.*, 35 N. Y. 131.

² *Carroll v. Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 292.

³ *Post v. Aetna Ins. Co.*, 43 Barb. 351; *Franklin Fire Ins. Co. v. Massey*, 33 Pa. 221.

⁴ *Myers v. Keystone Mut. Life Ins. Co.*, 27 Pa. St. 268.

⁵ *Brady v. Western Ass. Co.*, 17 U. C. (C. P.) 597.

⁶ *Hotchkiss v. Germania Fire Ins. Co.*, 5 Hun (N. Y.), 90; *Palmer v. St. Paul Fire & Mar. Ins. Co.*, 44 Wis. 201; *Georgia Home Ins. Co. v. Kinnier*, 28 Grat. (Va.) 88; *Young v. Hartford Fire Ins. Co.*, 45 Iowa, 377.

⁷ *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *ante*, § 144; *Peck v. New London Co. Mut. Ins. Co.*, 22 Conn. 575.

a contract to insure property, are properly excluded in an action against the company for breach of the contract. *Sanford v. Orient Ins. Co.*, 174 Mass. 416.

The establishment of an agency by a

foreign company gives to the agent apparent authority to bind it, according to the established and uniform usage among such agents, without regard to its private instructions. *Greenwich Ins. Co. v. Waterman*, 54 Fed. Rep. 839.

and premiums is sufficient; and it need be verbal only, unless required by the terms of the policy to be in writing.¹ And notice to an agent, at the time of effecting the insurance, of subsequent insurance, is notice to the company under a provision of the contract that notice of subsequent insurance shall be given to the company.² But mere knowledge of the fact of such insurance on the part of the agent is not equivalent to notice to the company;³ nor is such knowledge a waiver of the notice.⁴ And it is not notice, within the meaning of a proviso that notice shall be given to the agent or secretary of alterations increasing the risk.⁵ Knowledge of prior insurance in the same office is notice of other insurance.⁶ But a personal examination by the president and one of the directors of a company after a fire, is equivalent to notice of the loss to the company, such officers having thus acquired all the knowledge that would be desired from the required notice.⁷

§ 153. In Pennsylvania, however, the knowledge and consent of the agent to subsequent insurance has been held not to be that of the company. Thus where it was stipulated in the policy that insurance should not be obtained upon the property to an amount beyond two-thirds of its value, the obtaining insurance beyond that amount was held to work a forfeiture, unless the company, after notice, waived the forfeiture; and it was also held not to be within the authority of an agent empowered only to make surveys, receive applications, examine into the circumstances of loss, approve assignments, and receive assessments, to accept notice, and

¹ *McEwen v. Montgomery Co. Mut. Ins. Co.*, 5 Hill (N. Y.), 101; *Sexton v. Montgomery Co. Mut. Ins. Co.*, 9 Barb. (N. Y.) 191; *Schenck v. Mercer Co. Mut. Ins. Co.*, 4 Zab. (N. J.) 447.

² *New England Fire & Mar. Ins. Co. v. Schettler*, 38 Ill. 166.

³ *Schenck v. Mercer Co. Mut. Ins. Co.*, 4 Zab. (N. J.) 447; *Mellen v. Hamilton Fire Ins. Co.*, 5 Duer (N. Y.), 101; s. c. affirmed, 17 N. Y. 609; *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176.

⁴ *Forbes v. Agawam Mut. Ins. Co.*, 9 Cush. (Mass.) 470.

⁵ *Sykes v. Perry Co. Mut. Ins. Co.*, 34 Pa. St. 79; *Robinson v. Mercer Co. Mut. Fire Ins. Co.*, 3 Dutch. (N. J.) 134.

⁶ *Rowley v. Empire Ins. Co.*, 36 N. Y. 550.

⁷ *Roumage v. Mechanics' Fire Ins. Co.*, 1 Green (N. J.), 110. And see also *ante*, § 143.

by his consent, after the issue of the policy, to waive the forfeiture; and his approval therefore could be of no avail to the insured. It is on the principle of estoppel, and not of authority, the waiver takes place. The knowledge of a mere agent, unauthorized to represent the company beyond the specific powers committed to him, cannot be the ground of estoppel in a matter unconnected with the exercise of his powers. This can only take place when the knowledge lying at the foundation of the estoppel comes home to those officers who exercise the corporate powers of the company, or to an agent whose powers relate to the very subject out of which the estoppel arises.¹ Otherwise if notice is given before the policy issues.² So in Massachusetts, notice to an agent of alienation or assignment is not notice to the company, nor has the agent power to waive such notice, if required by the policy, nor to bind the company by his opinion that notice is not necessary.³

§ 154. **Sub-agents and Clerks.** — Where insurers issue their policies in blank, to be valid only when countersigned by their duly authorized agents, and appoint a firm of several persons to act as their general agents for a particular State, and refer to them as having charge of the appointment of agents within that State, a sub-agent appointed by one of the members of the firm, having a branch office at a place other than the chief place of business of the firm, will thereby acquire the power to countersign the policies. And a policy so countersigned will bind the company, notwithstanding that prior to the issue of the policy the firm holds a power of attorney from the insurance company empowering them to "receive moneys and to countersign and issue policies," and a like power of attorney was forwarded to the members of the firm who appointed the sub-agent, some months after the appointment. These powers of attorney do not concern the public, to whom they are unknown. They are rather in the nature of private instructions, bind-

¹ Mitchell v. Lycoming Mut. Ins. Co., 51 Pa. St. 402.

² People's Ins. Co. v. Spencer, 53 Pa. St. 353.

³ Tate v. Citizens' Mut. Fire Ins. Co., 13 Gray (Mass.), 79.

ing between the principal and agent, but without effect as against the public, who have treated with the agents on the assumption that they actually had the power which they exercised and were known by their principals to have exercised.¹ Under a like stipulation it has been held in Kentucky that the signature by a third person "for the agent," is not a compliance with the stipulation, and such a policy is void.² The clerk of an agent whose acts have been recognized by the company and accepted, may bind the company by his consent to a part payment of the premium.³ [But when a sub-agent signs a policy for the agent, who later with full knowledge of all the facts delivers the policy, the signature becomes his, and hence the company's.⁴] Generally agents of insurance companies authorized to contract for risks, receive and collect premiums, and deliver policies, may confer upon a clerk, or subordinate, authority to exercise the same powers. The service is not of such a personal character as to come under the maxim, *delegatus non potest delegare*.⁵

§ 154 A. An agent who has full power in a large territory to receive proposals, fix premiums, renew, &c., may appoint sub-agents to solicit and receive applications for premiums, forward applications, &c.⁶ It is not to be expected that a general agent should personally attend to all the affairs under his control. He may employ all necessary clerks, sub-agents, and surveyors to enable him to transact the business with accuracy, intelligence, and promptness, and may authorize his clerks to contract for risks so that they may bind the company by a parol contract.⁷ The com-

¹ Bowman v. U. S. Casualty Ins. Co., N. Y. Ct. of Appeals, affirming s. c. in N. Y. Supr. Ct. 1869, cited in Bliss, Life & Acc. Ins. 488; Kennebec Co. v. Augusta Ins. Co., 6 Gray (Mass.), 204.

² Lynn v. Burgoyne, 13 B. Mon. (Ky.) 400.

³ Bodine v. Exchange Fire Ins. Co., 51 N. Y. 117.

⁴ [Grady v. Amer. Cent. Ins. Co., 60 Mo. 116, 123.]

⁵ Bodine v. Exchange Fire Ins. Co., 51 N. Y. 117; Eclectic Life Ins. Co. v. Fahrenkrug, 68 Ill. 463; *ante*, § 127; Continental Life Ins. Co. v. Goodall, Cincinnati Supr. Ct. 1874, 5 Big. Life & Acc. Ins. Cas. 422; Mayer v. Mut. Life Ins. Co., 38 Iowa, 304; Planters' Ins. Co. v. Myers, 55 Miss. 479; Cooke v. Aetna Ins. Co., 7 Daly (N. Y.), 555.

⁶ [Krumm v. Insurance Co., 40 Ohio St. 225.]

⁷ [Kuney v. Amazon Ins. Co., 36 Hun, 66.]

pany is bound by the contract of employment of a soliciting agent by its general agent, unless the person employed had notice of restrictions on the authority of the general agent.¹ Foreign companies are responsible for the acts of all persons who aid in transacting its business with its authority, or without, if the company in any way avails itself of their acts.² If a sub-agent who has been correctly informed makes a mistake in filling in the wrong name of the applicant's doctor, the company is estopped.³ A mere stranger from whom the regular agents receive the premium, and to whom they deliver a policy which he countersigns and delivers to the assured, will bind the company. He is a sort of sub-agent.⁴ It is a question of fact for the jury whether an agent employed to effect insurance, without special instructions, is liable for brokers through whom it is effected, and also as to the extent of his responsibility.⁵

§ 155. **Agents of Accident Insurance Companies.** — Certain kinds of accident insurance — as of railway passengers — are effected by means of the purchase and sale of tickets issued by the companies to their agents, and sold by them or those in their employ like merchandise, the sale and delivery of the ticket by the agent or his employé on the one hand, and the payment of the premium by the purchaser on the other, consummating the contract. And the contract holds good whether the purchaser obtains his ticket from the company directly, or indirectly from any person having authority mediately from the company.⁶

¹ [Equitable Life Ass. Co. v. Brobst, 18 Neb. 526, 523.]

² [Continental Ins. Co. v. Ruckman, 127 Ill. 364.]

³ [Langdon v. Union Mut. Life Ins. Co., 14 Fed. Rep. 272; 22 Am. L. Reg. N. S. 385 (Mich.), 1882.]

⁴ [Camden C. Oil Co. v. Ohio Ins. Co., 5 Cin. L. Bul. 193, 6th Cir. (Ohio) 1880.]

⁵ [Hurrell v. Bullard, 3 F. & F. 445.]

⁶ Brown v. Railway Passenger Ass. Co., 45 Mo. 221.

CHAPTER VIII.

WARRANTIES.¹ — APPLICATION. — CONSTRUCTION.

ANALYSIS.

1. DEFINITIONS.

- § 156. A warranty is an express stipulation on the face of the policy, on the literal (?) truth or fulfilment of which the validity of the contract depends. It has the force of a condition precedent and must be strictly and literally (?) complied with, whether material to the risk or not (see § 170 and § 180, a, n.) whether the insured believed it true or not, or the agent or even the company knew it was false at the time of insurance (?) (§§ 156, 145). If it fail in any other way than by act of the insurer, of the law, or of God, the insured cannot recover. The law *ought to exclude honest errors undoubtedly immaterial, and substantial compliance should be enough*. Forfeitures because of honest immaterial error, or failure of literal fulfilment of a warranty, especially if it requires more than the will of the assured to fulfil it, is not justice, and if the parties so agree it is not a just agreement (§§ 156, 157, 161, 185). Moreover if the company itself knows the truth at the time of contracting it cannot be damaged by an error on the part of the assured, and should not set up the warranty. (See §§ 144 A, 144 G, 197, 207, 260–262.) So in some cases the agent's knowledge ought to estop the company (see ch. vii. anal. 5).
- § 157. Affirmative and promissory warranties. A warranty of present use not a promise as to the future use, but *ought* to be so held where the natural and well understood purpose of the question is to determine the nature of the risk to be borne, and the matter is too important for alteration in good faith (see §§ 191, 231, 247, 248, and ch. xi. anal. § 250). Smoking, Force-pump, Spermin-oil.

¹ Though we have treated the several subjects of warranty, representation, and concealment in separate chapters, it will be seen that these subjects are so nearly allied, that cases illustrative of each have much in common; and if it were material it would be difficult to determine under which chapter to arrange them. For the most part, a case in either chapter will illustrate the others, as the several subjects are almost invariably discussed together. And each subject will be further illustrated by cases cited when we come to treat of the several conditions, stipulations, and provisions of the contract.

2. WHAT IS PART OF THE POLICY.

In Massachusetts by statute neither by-laws nor application are part of the policy so as to become warranties, except so far as incorporated into the policy in full. Pub. Stats., § 712.

§ 158.

Face of policy includes statements written in the margin or across the policy, or in other papers referred to and made a part of the policy, but not endorsements on the back, or papers merely folded up in policy or stuck on with mucilage, unless such papers or endorsements are referred to in the policy; and even reference alone is not sufficient unless the language indicates *an intent to make the paper part of the contract* (§ 159). A doubt will be resolved against the company, (§§ 160-165, 170, 171).

Warranties not favored, § 158.

courts lean to make statements representations, § 162 (and they ought to lean a little harder than some of them do). general rule, a reference to application in policy makes its statements warranties, § 159.

but reference in mere general terms is not enough, § 159. it must be stipulated that the statements are warranties or conditions, § 159.

the words "on condition" may not be enough, § 162.

if there is room for doubt, they are representations, §§ 159, 162, 160-165, 170, 171.

so if any other purpose of the reference appears, § 159.

or if the purpose does not appear, § 164.

a statement though written on the policy itself may not be a warranty, § 164.

what the parties call representations cannot be made warranties by being made part of the policy, § 165.

question not answered is a nonentity, § 166.

if company issues policy, on the omission the question is waived, § 166.

part answer, warranty can go no further than the answer, § 166.

§ 159.

The application, survey, or other statements oral or written, if not referred to in the policy, are merely representations. (See also § 160.) If written or oral statements are referred to in the policy they may be proved by parol (§ 159).

§§ 160, 161.

Qualified statement or reference, knowledge, assertion of *belief*, not of absolute truth. The several stipulations in the policy, application, &c., must be carefully *compared*, for something may appear inconsistent with holding statements to be warranties, §§ 161, 168, 169.

or showing that they are warranties only as to some particulars and representations as to others, § 160.

"so far as known," §§ 161, 166.

"In all respects true," followed by "to best of my knowledge," no warranty, § 161.

other qualifying clauses, §§ 160, 161.

It is a question for the jury whether the assured *did* answer according to his best knowledge, § 161.

3. CONSTRUCTION AGAINST WARRANTIES.

- §§ 162-165. Constructive warranties not favored. If the statement or reference appear to be made for another purpose than warranty, or the purpose be doubtful, it will not be construed as a warranty, §§ 162-165.
 where a statement in all fairness and good faith must have the effect of a warranty it will be so construed though not so in form ; see §§ 250-252, 157, 191, 247, 248, 231.
 immaterial, unguarded, and superfluous statements ought not to be converted into warranties by the courts, § 170.
 courts lean away from warranties, § 162.
 the clearest language necessary to create one, § 162.
 stipulation to keep openings closed not a warranty because not expressed to be on penalty of forfeiture, § 164.
- § 165 A. In the case of marine insurance there is an implied warranty of seaworthiness.
- § 166. Ambiguous and superfluous answers. Unanswered questions are waived if a policy is issued on the application.
- § 167. No application necessary.
- §§ 168, 169. The application may limit and modify the policy.
 "If any of the statements, &c., be untrue."
 is modified by a clause in the application.
 "*fraudulent* concealment or *designedly* untrue." See also § 161.
- § 170. Matter immaterial to the risk or statements not required by the conditions of the contract may be expressly warranted, but no implied warranty will be raised in such a case.
 Warranties will be construed strictly against those for whose benefit they are made, and so as to save a forfeiture if possible.
 Dividends earned by company applied to save premium note.
- § 171. Warranties strictly construed as to their scope.

4. CONSTRUCTION IN GENERAL.

- § 172. Interpretation of insurance contracts governed by the principles that apply to other contracts. (See also § 173.) Insurance law all grew out of marine insurance, which has therefore to be continually referred to for the elucidation of other kinds.
- § 172 A. Construction :
should be without favor to either party.
 courts too often act as though insurance companies were conclusively presumed to be naughty boys fit only for the shingle.
 intent of parties must be sought.
 surrounding circumstances to show what goods were meant.
 conversations at time competent.
 and contemporaneous insurance literature.
 printed conditions not applicable to particular case ignored.
 what the promisor knew the promisee understood governs.
 proper to show that a name of a locality applies by common repute, though geographically incorrect.

course of dealing admissible.

parts of a day not reckoned. Warranty of safety on December 9 is satisfied if safe on *any* part of the day, though lost before policy is signed.

if facts clear, construction is for court.

false warranty as to part of severable policy not avoid whole.

§§ 173-179. Usage :

If the usage offered in evidence is not contrary to a settled principle of law and justice, § 179 B ;

and was known to the person against whom it is invoked, actually or constructively by reason of its general and established character, or because of his entering by his dealings the sphere controlled by it, as in using the facilities of a bank, §§ 179 C, 179 E ;

and is not excluded by the terms of the contract, § 179 D ;

and does not import a new and distinct condition into the agreement, § 180 ;

it is admissible to explain the meaning of the parties, and the manner in which the contract is to be carried out, §§ 173, 179, 179 A.

§§ 174, 175. The object is indemnity, and the construction will be liberal to accomplish it. (See also § 175.)

all clauses will be reconciled and given their effect if possible.

Unreasonable conclusions will be avoided.

contract sustained if possible, § 175.

company not escape on mere technicalities, § 175. (Neither ought it to be held on them.)

§§ 175, 176. When other rules of interpretation fail to resolve a doubt the language is to be taken most strongly against the person using it. Courts will not declare a forfeiture unless distinctly so provided.

§ 177. Written words prevail over printed ones ; if they are not inconsistent both sustained. See § 239.

§ 178. Insurers held to the exact words of a warranty. A false representation about a building not insured immaterial. Incidental keeping of a barrel of oil not a violation of a general provision against storing oil. Alteration in machinery not a forfeiture. Running *fires and engine* at night not a running of the *mill*. A cold is not "sickness." Bringing shavings into shop no breach of warranty that business is making bathtubs.

§ 180 a. Statute interference has been necessary to prevent the companies from defrauding the insured by insisting on immaterial and unreasonable conditions, in policies almost forced upon the people, so voluminous and printed so fine as to discourage reading and comprehension, fixed up by the companies' agents, with no suspicion on the part of the insured as to the trap into which he is being decoyed, — policies gotten up expressly to prevent liability, and even going so far as to assert that the agent was the agent of the insured not of the company. (See the fine statement of Ch. J. Doe, § 180 a, n.)

§ 156. **Definition of Warranty.** — In all contracts of insurance, certain statements are made, certain stipulations are entered into, and certain provisos, conditions, and by-laws are introduced or referred to, in a more or less explicit manner. As a general rule, if these statements, stipulations, &c., are contained in, or expressly made a part of the policy, they become *warranties*, and are so denominated in the law of insurance. We say as a general rule, because we shall see as we advance in this chapter that there are important exceptions. “An express warranty is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfilment of which the validity of the entire contract depends.” This is the definition given by Arnould,¹ which has met with general acceptance. By a warranty the insured stipulates for the absolute truth of the statement made, and the strict compliance with some promised line of conduct, upon penalty of forfeiture of his right to recover in case of loss should the statement prove untrue, or the course of conduct promised be unfulfilled. A warranty is an agreement in the nature of a condition precedent, and like that, must be strictly complied with.² (a)

¹ 1 Ins. 577.

² *Daniels et al. v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416; *Ripley v. Ætna Fire Ins. Co.*, 30 N. Y. 136; *Campbell v. N. E. Mut. Life Ins. Co.*, 98 Mass. 381.

(a) Insurance companies cannot, however, contract in disregard of the plain provisions of a statute made for their guidance. Thus, under statutes such as those of Pennsylvania of June 23, 1885, and of Maryland of 1894, declaring that a misrepresentation or untrue statement by an applicant for life insurance, when made in good faith, shall not work a forfeiture, unless relating to a matter material to the risk, the courts of both these States hold that the “misrepresentation” or “untrue statement” in the application, when sought to be made a ground of defence, must be of some material matter, and that the parties are not free to contract, — in the face of the statute, which cannot be waived, — that immaterial matter shall be material. *Herman v. Fidelity M. L. Ass’n*, 151 Penn. St. 17, 24; *March v. Met’n L. Ins. Co.*, 186 id. 629; *Fidelity M. L. Ass’n v. Ficklin*, 74 Md. 172, 185; see *Same v. Miller*, 92 Fed. Rep. 63, 71; *Penn. Mut. L. Ins. Co. v. Mechanics’ Sav. B. & T. Co.*, 43 U. S. App. 75. The effect of the Massachusetts statute is that misrepresentations of fact, whether called by the parties a warranty or a representation, are equally misrepresentations, and that the insured can only defeat the policy by showing, not only that the statements or answers were incorrect, but also either that the misrepresentations were made with actual intent to deceive, or that the matter misrepresented increased the risk of loss. *White*

Whether the fact stated or the act stipulated for be material to the risk or not, is of no consequence,¹ the contract being that the matter is as represented, or shall be as promised; and unless it prove so, whether from fraud, mistake, negligence, or other cause, not proceeding from the insurer, or the intervention of the law or the act of God, the insured can have no claim.² [When a policy provided that it should be void if any of the warranties were "false" or fraudulent, this was held to mean untrue whether with or without the

¹ [Bennett v. Agr. Ins. Co., 50 Conn. 420; Thomas v. Fame Ins. Co., 108 Ill. 91; Ala. Gold L. Ins. Co. v. Garner, 77 Ala. 210; Schwarzbach v. Protective Union, 25 W. Va. 622, 652; Dwight v. Germania Life Ins., 103 N. Y. 341. A warranty is a part of the contract, and whether material or not must be strictly complied with, while a representation is collateral or preliminary to the contract, and though false does not avoid the contract unless actually material or clearly intended to be made material by the parties. Ala. Gold Life Ins. Co. v. Johnston, 80 Ala. 467.]

² Cooper v. Farmers' Mut. Fire Ins. Co., 50 Pa. St. 299; Newcastle Fire Ins. Co. v. Macmorran, 3 Dow, P. C. 255; Sayles v. North Western Ins. Co., 2 Curtis C. Ct. (Mass.) 610, 612; Witherell v. Maine Ins. Co., 49 Me. 200; Pawson v. Watson, Cowp. 785; Anderson v. Fitzgerald, 24 Eng. L. & Eq. 1; 4 H. of L. Cas. 484; Duckett v. Williams, 2 C. & M. 348; *post*, §§ 350, 352.

v. Provident S. L. Ass. Society, 163 Mass. 108, 115; Levie v. Met'n Life Ins. Co., *id.* 117; King Brick M. Co. v. Phoenix Ins. Co., 164 Mass. 291; Wright v. Vermont L. Ins. Co., *id.* 302; Hogan v. Met'n Life Co., *id.* 448; Stocker v. Boston Mut. F. Ins. Co., 170 Mass. 224; Dolan v. Mutual Reserve Fund Life Ass'n, 173 Mass. 197.

In Iowa, by statute a copy of the application must be attached to or indorsed on the policy, in order that the company may plead or prove the application in an action on the policy. Cook v. Federal Life Ass'n, 74 Iowa, 746; McConnell v. Iowa Mut. Aid Ass'n, 79 *id.* 757; Grimes v. Northwestern Legion of Honor, 97 *id.* 315. But this does not preclude an officer or incorporator, sought to be held liable for the loss, from using such evidence in showing that the insured was not misled to his detriment. Moore v. Union Fraternal Acc. Ass'n, 103 Iowa, 424, 428. In

Massachusetts also, the legislature has aimed to benefit policy holders by obliging insurance companies to attach to each policy a correct copy of the application, so that the insured may know what are the precise terms of his application; and this is now treated as the law applicable alike to fire, life, and assessment insurance. Considine v. Met'n Life Ins. Co., 165 Mass. 462, 465.

A policy stipulation that the statements and answers in the application are warranties and if untrue, though made in good faith, the policy shall be void notwithstanding any statute to the contrary, is invalid in so far as it conflicts with a statute providing that no representation made in good faith shall work a forfeiture or be a ground of defence unless it relates to some matter material to the risk. Fidelity Mut. L. Ass'n v. Ficklin, 74 Md. 172.

assured's knowledge of their untruth.¹ A breach of warranty is fatal though the insured acted in perfect good faith.^{2(a)} The insured cannot claim that an answer which he has declared shall be a warranty was made by mistake or inadvertence.³ Mere knowledge by the agent, or by the company, that a warranty is not true at the time it is made does not relieve the assured from the consequences of a breach, or convert the contract into a different warranty, and is no basis for reforming the contract.⁴ Knowledge of the agent that a warranty was false is no waiver by the company.^{5]}

One of the very objects of the warranty is to preclude all controversy about the materiality or immateriality of the statement. The only question is, has the warranty been kept? There is no room for construction; no latitude; no equity. If the warranty be a statement of facts, it must be literally true; if a stipulation that a certain act shall or shall not be done, it must be literally performed.⁶ A learned

¹ [Foot v. *Ætna* Life Ins. Co., 61 N. Y. 571, 577.]

² [Commonwealth Mut. Fire Ins. Co. v. *Huntzinger*, 98 Pa. St. 41.]

³ [Ala. Gold L. Ins. Co. v. *Garner*, 77 Ala. 210.]

⁴ [Commonwealth Mut. Fire Ins. Co. v. *Huntzinger*, 98 Pa. St. 41, 47; State Mut. Fire Ins. Co. v. *Arthur*, 30 Pa. St. 315, 331.]

⁵ [Tebbetts v. *Hamilton* Mut. Ins. Co., 3 Allen, 569; Foot v. *Ætna* Ins. Co., 61 N. Y. 571, 576; Dewees v. *Manhattan* Ins. Co., 35 N. J. L. 366, 371. But see *contra*, and much better doctrine as to cases in which the company itself knows the truth, §§ 144 A., 133 A.]

⁶ *Ripley* v. *Ætna* Fire Ins. Co., 30 N. Y. 136; *Hibbert* v. *Pigon*, Park, Ins. 339; s. c. Marsh. Ins. 272, per Lord Mansfield; *Anderson* v. *Fitzgerald*, 4 H. of L. Cas. 484; s. c. 24 Eng. L. & Eq. 1. In *Hutchison* v. *Nat. Loan* Fire Ins. Co., 7 Ct. of Sess. Cas. (Scotch) 2d Series, 467; s. c. 3 Big. Life & Acc. Ins. Cas. 444, it was held that this warranty did not apply to facts unknown to the applicant without negligence, as, for instance, the fact of the existence of a latent and unknown disease of which there had been no symptoms, which was unsuspected, and only made known by a *post-mortem* examination. The statement was that the applicant enjoyed good health, and that no circumstance or information touching health with which the insurers ought to be made acquainted was withheld. It was sufficient if such a statement was true according to the knowledge and belief of the applicant. See also *post*, § 202. [When the assured guaranteed to have the average price of freight 40s. per ton on his ship, but in reality it was only 32s., it was held to avoid the policy, although by adding the proceeds from passengers the amount would have made more than 40s. *Lewis* v. *Marshall*, 7 M. & Gr. 739, 743.]

(a) Fraud is not necessary to avoid Under a statute making immaterial a policy when a warranty is broken. warranties in an application simply

judge and author declares it to be unfortunate that so strict a rule has been established, and intimates, what is no doubt entirely true, that courts are not at all inclined to go beyond the precedents to support a warranty.¹ [There are even authorities to the effect that in dealing with warranties common sense is not to be lost sight of, and that the fair practical intent of the parties is to be sought, not the hair splitting of a college of wit crackers, and that substantial fulfilment of a warranty is enough. Honest errors in the statement of the ages of ancestors or their nationality will not avoid a policy, though made a part of it on condition of avoidance if in any respect untrue. It is subversive of the true intent of the contract to avoid it because of any trivial misrepresentation not material to either party.² Where a building is described as two stories high, the main part being so, but a small rear addition being only one story, the inaccuracy is not a breach of warranty.³ When a vessel was registered as captained by *A.*, who professedly had no nautical experience, but was in reality captained by *B.*, a competent officer, it was held that the warranty for competent seamen, officers, &c., was thus far complied with.⁴ Where the policy stated that the building was occupied as a boarding-house, and it appeared in proof that the lower part of it contained a bar and billiard hall, all kept by the same

¹ Per Duer, J., *Westfall v. Hudson River Fire Ins. Co.*, 2 Duer (N. Y. Superior Ct.), 490.

² [*Germania Ins. Co. v. Rudwig*, 80 Ky. 223, 234 (overruling *Farmers' & Drivers' Ins. Co. v. Curry*, so far as opposite). The Act of Feb. 4, 1874, declared "that all statements and descriptions in any application for or policy of insurance shall be deemed and held representations and not warranties, nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy," and the court remarked that the act was merely declaratory of the law of Kentucky.]

³ [*Wilkins v. Germania Fire Ins. Co.*, 57 Ind. 527.]

⁴ [*Draper v. Com. Ins. Co.*, 21 N. Y. 378, 383-84. Comstock, Ch. J., dissenting, but on grounds that do not seem to go to the substance of the matter. The common sense is with the majority opinion this time for a rarity.]

representations, their materiality is not a question for the jury, if the risk is clearly material. *Dolan v. Missonri Town Mut. F. Ins. Co.* (Kans. App.), 29 Ins. L. J. 473. See *Ward v. Met'n L. Ins. Co.*, 66 Conn. 227; *Foley v. Royal Arcanum*, 151 N. Y. 196.

tenant, but no evidence was given that the risk was thereby increased, it was held that there was no breach of warranty.¹ Where a policy states that the property insured is in a building "*detached at least one hundred feet,*" &c., the italicised words constitute a warranty that no buildings which constitute an exposure and increase the risk are nearer than one hundred feet, but a small office, seventy-five feet from the building, and found by the trial court not to be an exposure or to increase the risk, is not a breach.^{2]}

No particular form of words is necessary to constitute a warranty. Any statement or stipulation upon the literal truth or fulfilment of which in the intention of the parties the validity of the contract is made to depend, whether appearing as a condition or warranted, or however otherwise,³ amounts to a warranty.⁴ But no particular form of words will make a statement or stipulation a warranty, not even the use of the word "warranty," where it is apparent, from the context or from the other parts of the contract, that it is not the intention of the parties to make the validity of the contract depend on the literal truth or fulfilment of the statement or stipulation.⁵ [A statement in the application that the insurer is a single man, is an absolute warranty.⁶ The words in a policy on a ship "prohibited from the river and gulf of St. Lawrence, between September 1 and May 1" constitute a warranty that the vessel shall not enter those waters in the times specified.⁷ A statement by the assured that the building to be insured was tenanted, is not a warranty.⁸ The burden of proving the performance of an ex-

¹ [Martin v. State Ins. Co., 44 N. J. 485.]

² [Burleigh v. Gebhard Fire Ins. Co., 90 N. Y. 220.]

³ [See last note in this section.]

⁴ Wright v. Eq. Life Ass. Co. (Supr. Ct. N. Y.), 5 Big. Life & Acc. Ins. Cas. 401.

⁵ Scales v. Scanlan, 6 Irish Law, 367; Howard, &c. Ins. Co. v. Cornick, 24 Ill. 455; Wheelton v. Hardisty, 8 E. & B. 232; Kingsley et al. v. New England Mut. Fire Ins. Co., 8 Cush. (Mass.) 393; Fitch v. Am. Popular Life Ins. Co., 59 N. Y. 557; *post*, § 161 et seq.

⁶ [Jeffries v. Union Mut. Life Ins. Co., 1 Fed. Rep. 450, Mo. 1880; 1 McCrary, 114.]

⁷ [Cobb v. Lime Rock F. & M. Co., 58 Me. 326, 327.]

⁸ [Schultz v. Merchants' Ins. Co., 57 Mo. 331, 337.]

press warranty rests upon the assured.¹ When the policy “prohibited from all guano islands except Chinchas,” the burden is on the assured to show that there has been no breach of the warranty.²

§ 157. Warranties are distinguished into two kinds: *affirmative*, or those which allege the existence at the time of insurance of a particular fact, and avoid the contract if the allegation be untrue; and *promissory*, or those which require that something shall be done or omitted after the insurance takes effect and during its continuance, and avoid the contract if the thing to be done or omitted be not done or omitted according to the terms of the warranty.³ [When by the policy the assured agreed to use only lard and sperm oil for lubricating purposes, and also stated that there was a force pump on the premises, and agreed to have it always ready for use and plenty of hose on hand, — these were held promissory warranties in the nature of conditions subsequent,⁴ and any substantial breach would avoid the policy. Whether a slight mixture of petroleum is a substantial breach is a question for the jury. The clause in a policy, stating that the insured premises are “used” for winding yarn, &c., is a warranty only of the *present* use, not of the future.⁵ Where the application, the answers in which are warranties by the terms of the contract, states that “smoking is not allowed on the premises,” the policy is not avoided although the insured himself afterward smoked on the premises, the fire not having originated from that cause. The question did not call for a warranty of *continuance* of the prohibition against smoking, and the statement being true as to the practice at the time of application there was no breach of warranty. Indeed it does not appear that the prohibition was removed, but that the smoking was in vio-

¹ [McLoon v. Com. Mut. Ins. Co., 100 Mass. 472, 474.]

² [Whiton v. Albany, &c. Ins. Cos., 109 Mass. 24, 30.]

³ Borradaile v. Hunter, 5 M. & G. 639; Jennings v. Chenango Co. Mut. Ins. Co., 2 Denio (N. Y.), 75, 78; Stout v. City Fire Ins. Co., 12 Iowa, 371.

⁴ [Copp v. German-American Ins. Co., 51 Wis. 637, 640.]

⁵ [Smith v. Mech. & Trad. Ins. Co., 32 N. Y. 399, 402.]

lation of the rule of the place.¹ Where the company asked, "What are the facilities for extinguishing fires?" — and the answer was, "Force pump, and abundance of water;" it was held that there was no promise that the pump should be in good order in the future.² A warranty of the existence of a force pump on the insured premises, *at all times ready for use*, extends to the fact that there is sufficient power to work the pump.³ The judge rightly thought that the inquiries and facts of the case distinguished it from *Hide v. Bruce*,⁴ where Lord Mansfield decided that a warranty that a ship should have twenty guns, did not include of necessity men enough to work them. Such constructions as those just mentioned in 2 Dougl., and in R. I., seem to err from the path of common-sense fairness as far against the company as the literal-fulfilment-of-warranty idea errs in favor of the company. If a man who is asked to insure inquires what are the facilities for putting out fires, and he is told that there is a force pump, would it be fair and honest dealing if the pump was in a dry well, or broken, or there was no means of using it? And if the pump was all right when the application was made, but became useless or was taken away before the policy was issued, would not the assured be held to inform the company?⁵ And is he obliged to be honest only until he gets his grip on the contract, and not afterward? Or is it less important to the company to have a good pump on the premises after they have taken the risk than before? Plain, fair sense seems to have a little place in some parts of insurance law.]

§ 158. **What constitutes a Part of the Contract; Papers annexed and referred to.** — Questions sometimes arise as to whether the statements and stipulations are embraced in, or constitute part of the policy. Usually the application, proposals, conditions annexed, and by-laws are referred to in the policy itself, and by express terms made part of it; or

¹ [*Hosford v. Germania F. Ins. Co.*, 127 U. S. 399, 403.]

² [*Gilliat v. Pawtucket Mut. Fire Ins. Co.*, 8 R. I. 282.]

³ [*Sayles v. N. W. Ins. Co.*, 610, 613; 2 Curtis C. C. 610.]

⁴ [3 Dougl. 213.]

⁵ [See § 190.]

they are declared to be the basis upon which it is made,¹ or the policy is declared to be issued upon the faith thereof. When this is the case, of course there is no room for doubt.² When, however, this is not the case, it becomes a question of the first importance to determine whether they are, or are not, part of the policy; for if they are not, then they are not warranties, but only representations, as to the truth of, and compliance with which there is much less strictness required, as will be presently shown.^(a)

It is sufficient if they appear anywhere upon the face of the policy, though not written in the body of it, as upon the margin,³ or written across it;⁴ or are embraced in several papers each referring to the others as parts of the contract,⁵ though they are not necessarily warranties because they appear upon the face of the policy.⁶ Nor is it material that

¹ [When a policy states that if the declarations of the insured, "upon the faith of which the policy is made, shall be found to be in any respect untrue," then the policy shall be void, "the entire truthfulness of such declarations is made a condition precedent to recovery, and if proved either false or fraudulent, the policy is void, whether or not the matter be material to the contract, or whether the insurers issued the policy on the faith of these declarations." *Brennan v. Security, &c. Co.*, 4 Daly, 296. A provision in a policy that if answers should be found false or fraudulent, the policy should be void, does not waive the previous provisions making the answers warranties. *Foot v. Ætna, &c. Ins. Co.*, 4 Daly, 285, 293.]

² *Cushman v. United States Life Ins. Co.*, 70 N. Y. 72.

³ *Bean v. Stupart*, Doug. 11; *Patch v. Phoenix Mut. Life Ins. Co.*, Sup. Ct. Vt. 1872, 2 Ins. L. J. 36.

⁴ *Kenyon v. Berthon*, Doug. 12, n.

⁵ *Bobbitt v. Liverpool, &c. Ins. Co.*, 66 N. C. 70.

⁶ *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381.

(a) See *Thomson v. Weems*, 9 A. C. 671; *Davies v. National M. Ins. Co.*, [1891] A. C. 485; *Hambrough v. Mutual L. Ins. Co.*, [1895] W. N. 18; *Cawley v. Nat. E. A. Ass'n*, 1 C. & E. 597; *Oshkosh Packing Co. v. Mercantile Ins. Co.*, 31 Fed. Rep. 200; *Cotten v. Fidelity Co.*, 41 id. 506; *Pacific M. Ins. Co. v. Snowden*, 58 id. 342; *Provident S. L. Ass. Society v. Llewellyn*, id. 940; *Manufacturers' Acc. I. Co. v. Dorgan*, id. 945; *New York Acc. Ins. Co. v. Clayton*, 59 id. 559; *Brady v. United L. Ins. Co.*, 60 id. 727; *Fidelity & C. Co. v. Alpert*, 67 id. 460; *Selby v. Mutual L. Ins. Co.*, id. 490; *Phinney v. Mutual L. Ins. Co.*, id. 493; *Fidelity M. L. Ass'n v. Miller*, 92 id. 63; *Christian v. Conn. Mut. L. Ins. Co.*, 143 Mo. 460; *J. B. Ehram M. Co. v. Phenix Ins. Co.*, 43 Neb. 554; *Virginia F. & M. Ins. Co. v. Morgan*, 90 Va. 290; *Albert v. Mut. L. Ins. Co.*, 122 N. C. 92; *McCullum v. Mutual L. Ins. Co.*, 55 Hun, 103; *supra*, § 156, n. (a).

the application is in pencil.¹ And where a policy printed upon one half of a sheet was delivered, and upon the other half of the sheet were the "conditions of insurance," these conditions, so annexed, were held to be *prima facie* a part of the policy, although no express reference was made to them in the body of the policy.² Where certain "rules and regulations" appended to a policy were referred to as "accompanying articles," the reference was held sufficient to make them conditions of the contract.³ So of conditions annexed, though unsigned.⁴ But a paper containing particular statements relating to the subject-matter of insurance attached to the policy at the time it is executed is no part of the policy.⁵ Nor is an unattached paper folded up and enclosed in the policy containing similar particulars.⁶ [Nor a piece of paper stuck on by mucilage and not referred to in the policy.⁷] And an indorsement on the back of an accident policy, showing the classification of risks assumed by the company, with a preliminary statement explanatory of the rights of the different classes, can be regarded as part of the contract only so far as it is specifically referred to in the policy as constituting a part of it; and a reference to the classification will not import the preliminary explanatory statement into the contract.⁸ So printed by-laws on the back of a policy are not part of the contract, unless referred to and made part of it.⁹ Nor is an indorsement of

¹ City Ins. Co. v. Bricker (Pa.), 9 Ins. L. J. 784.

² Murdock v. Chenango County Mut. Ins. Co., 2 Comst. (N. Y.) 210; Roberts v. Chenango County Mut. Ins. Co., 3 Hill (N. Y.), 501.

³ Hill v. Equitable Mut. Fire Ins. Co. (N. H.), 6 Ins. L. J. 314.

⁴ Kensington Nat. Bank v. Yerkes, 86 Pa. St. 227.

⁵ Bize v. Fletcher, Doug. 13, n.

⁶ Pawson v. Barnevelt, Doug. 13, n.; Pawson v. Watson, Cowp. 785. In Sillem v. Thornton (3 E. & B. 868), a description of the property contained in a paper attached to the policy, and referred to as attached thereto, was treated as a part of the policy, though the point was not discussed. But this was a liberality of construction in favor of the insurers which is inconsistent with the later decisions. In that case, however, the decision would doubtless have been the same had the attachment been treated as a representation.

⁷ [Goddard v. Ins. Co., 67 Tex. 69.]

⁸ Adm'rs of Stone v. U. S. Casualty Co., 34 N. J. L. 371.

⁹ Kingsley v. New England Mut. Fire Ins. Co., 8 Cush. (Mass.) 393.

the name and place of business of the insurer on the back of the policy.¹ And a reference to another paper as an application or survey, or as containing representations, or in language not indicating that it is the intent to make the application part of the contract, does not make it a warranty;² nor is it necessary in such a case for the plaintiff to put in the application with the policy, in proving his case, even though the application makes its own statements a part of the contract.³

Where the statute requires that the "conditions of insurance shall be stated in the body of the policy," a statement of the substance of the conditions on the face of the policy, with a distinct reference to them, printed on a subsequent page, is sufficient; but a general declaration on the face of the policy that it is made with reference to the conditions annexed, and that they are a part of the contract, does not make them a part of the contract.⁴ And the courts are disinclined to make a paper by reference a warranty and part of the contract, unless clearly obliged to.⁵

§ 159. **Application and Survey, when Parts of Contract.** — As a rule, when the application is referred to as forming a part of the contract, the statements therein contained are held to have the force and effect of warranties.⁶ (a) But as

¹ *Ferrer v. Home Ins. Co.*, 47 Cal. 416.

² *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. (N. Y.) 481; *Houghton v. Manuf. Mut. Fire Ins. Co.*, 8 Met. (Mass.) 114.

³ *Edington v. Mut. Life Ins. Co.*, 67 N. Y. 185.

⁴ *Eastern Railroad v. Relief Ins. Co.*, 98 Mass. 420; *Mullaney v. National Ins. Co.*, 118 id. 393.

⁵ *Sayles v. North Western Ins. Co.*, 2 Curtis (U. S. C. Ct.), 610; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Albion Lead Works v. Williamsburgh City Fire Ins. Co.*, C. Ct. (Mass.) 9 Ins. L. J. 435; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454. See *post*, § 178.

⁶ [*Phoenix Ins. Co. v. Benton*, 87 Ind. 132.]

(a) An application which is made a part of the policy, the latter being also expressly based thereon, are construed together as one contract, unless there is clear evidence of fraud. *McMaster v. New York L. Ins. Co.*, 90 Fed. Rep. 40; *Parrish v. Va. F. & M. Ins. Co.* (N. C.),

20 Ins. L. J. 95; *Cronin v. Phila. F. Ass'n* (Mich.), 82 N. W. 45. In case of conflict between them, the policy controls. *Goodwin v. Provident Sav. L. Ass. Ass'n*, 97 Iowa, 226. But the application must be actually accepted, and if the applicant dies pending its consideration,

the application, whether embracing the survey, which in general is but a plan or description of the premises, showing with more or less completeness its condition and surroundings, or having the latter attached to it actually or by reference, contains merely the data upon which the real contract is based, and may be by parol only, if the policy contains no stipulation making its statements warranties, they will have the force and effect of representations only;¹ and generally references to statements and agreements, in order to have the effect of avoiding the policy in case the statements prove untrue or the agreement be not strictly kept, must be so explicit as to make them equivalent to conditions precedent. [The words "as per application," after a statement in the policy of the buildings and amounts insured, is not sufficient to make the application a part of the policy.² But the clause "false representations in the application in regard to the condition, situation, or value of the property shall render the policy void," makes the statements of the application warranties in a policy which refers to the appli-

¹ *Columbia Ins. Co. v. Cooper*, 50 Pa. 331; *Denny v. Conway Stock & Mut. Ins. Co.*, 13 Gray (Mass.), 492; *Shoemaker v. Glens Falls Ins. Co.*, 60 Barb. (N. Y.) 84. In *May v. Buckeye Mut. Ins. Co.*, 25 Wis. 291, a "survey" is held to be coextensive with the application if made by the agent. See also *Albion Lead Works, &c. supra*.

² [*Vilas v. N. Y. Central Ins. Co.*, 72 N. Y. 590.]

there is no completed contract. *Jacobs v. New York L. Ins. Co.*, 71 Miss. 658. So if there is fraud or double dealing on the part of the insurer's agent in delivering the policy when he knows that the applicant has become suddenly and dangerously ill. *Equitable Life Ass. Society v. McElroy*, 83 Fed. Rep. 631; see *Rossiter v. Aetna L. Ins. Co.*, 91 Wis. 121. In general, a life insurance contract must be complete before the death of the insured, but its delivery to the beneficiary may be made later. See above; *Newcomb v. Provident Fund Society*, 5 Col. App. 140; *Paine v. Pacific Mut. L. Ins. Co.*, 51 Fed. Rep. 689; *Mutual L. Ins. Co. v. Thomson*, 94 Ky. 253; *McClave v. Mutual Reserve Fund*

L. Ass'n (N. J.), 22 Ins. L. J. 877; *German Ins. Co. v. Read* (Ky.), 20 Ins. L. J. 86; *Riegel v. American L. Ins. Co.*, 153 Penn. St. 134. So if a member of a mutual insurance company is suspended for non-payment of assessments, and neglects during his lifetime to secure his reinstatement in accordance with the terms of his benefit certificate and the provisions of the order, his restoration to membership cannot be effected after his death by payment of the sum due from him to the company at the time of his death, though the period within which, if alive, he could have secured his reinstatement, has not yet expired. *Modern Woodmen v. Jameson*, 49 Kansas, 677.

cation and makes it a part thereof.¹ A prospectus is not made part of the policy by an indorsement on the latter that it may be had *gratis*, and its statements are only representations.² And unless it is expressly so stipulated, the statements or agreements should, on the face of the instrument, clearly and precisely show that it is the intention of the contracting parties to make their literal truth, or literal performance, a condition precedent. If there be any doubt on this question, the statement or agreement will be held to have the force only of a representation;³ and written statements not referred to, there being no formal application, will be regarded as representations, if so intended.⁴ If written or oral statements are referred to in the policy, they may be proved by parol.⁵ And if a policy be executed and delivered, a survey subsequently made and handed in, the policy not being made conditional upon the procuring of the survey, is inoperative.⁶ A mere reference to an application or survey, in general terms, does not make its contents warranties. To effect this, there must be other language used sufficient to indicate that it was the intention to make the paper referred to a part of the contract.⁷ (a) And the same

¹ [American Ins. Co. v. Gilbert, 27 Mich. 429.]

² [Knickerbocker L. Ins. Co. v. Heidel, 8 Lea (Tenn.), 488.]

³ Wheelton v. Hardisty, 8 El. & B. 232; Stokes v. Cox, 1 H. & N. Exch. 320, 533. In the former of these cases it seems to be the opinion of the court that when the policy recited that "a proposal was made, and that, 'thereupon' a policy was issued," "thereupon" referred to time, and not to the proposal as the basis of the contract. See also *ante*, § 156 and § 161.

⁴ Boardman v. N. H. Mut. Fire Ins. Co., 20 N. H. 551.

⁵ Clark v. Manufacturers' Mut. Fire Ins. Co., 2 W. & M. (U. S. C. Ct.), 472. As to the bearing of the "prospectus" issued by the insurers upon the contract, see *post*, §§ 355, 356.

⁶ Le Roy v. Park Fire Ins. Co., 39 N. Y. 56.

⁷ Delonguemare v. Tradesmen's Ins. Co., 2 Hall (N. Y. Superior Ct.), 589; Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72; Wall v. Howard Ins. Co., 14 Barb. (N. Y.) 383; Sheldon v. Hartford Fire Ins. Co., 22 Conn. 235; Commonwealth's Ins. Co. v. Monninger, 18 Ind. 352; Aetna Ins. Co. v. Grube, 6 Minn. 82; Le Roy v. Market Ins. Co., 39 N. Y. 90; Steward v. Phoenix Fire Ins. Co., 5 Hun (N. Y.), 261.

(a) The courts are reluctant to import terms of warranty contained in the application for insurance into the completed agreement when the policy does not clearly disclose the parties' agreement to the union of the two papers in one contract. Phoenix Life Ins. Co. v. Raddin, 120 U. S. 183. But when

is true although there be added to the general terms of reference the statement that the reference is for a more full description.¹ And though the application be referred to in such terms as to import it into the contract, if its statements be also referred to as "representations," they will have that character notwithstanding they are made part of the contract.² So if the reference, by a fair construction, appear to be for another purpose than to make its statements warranties.³ So if the survey is referred to in the policy as on file in one place, where in fact it is, and the conditions making it a part of the contract refer to it as on file in another, where in fact it is, not.⁴ [In Canada even though the application is made a part of the policy, a misstatement or wrong answer will not, in the absence of an express warranty, avoid the policy unless it is material. The company has only the *statutory* defences.⁵] In *Kentucky and Louisville Mutual Insurance Company v. Southard*,⁶ the court

¹ *Snyder v. Farmers' Ins. & Loan Co.*, 13 Wend. (N. Y.) 92; s. c. affirmed, 14 id. 481.

² *Houghton v. Manuf. Ins. Co.*, 8 Met. (Mass.) 114; *American Popular Life Ins. Co. v. Day*, 39 N. J. (Law) 89.

³ *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381.

⁴ *Clinton v. Hope Ins. Co.*, 45 N. Y. 454.

⁵ [*Goring v. London Mut. Fire Ins. Co.*, 10 Ont. R. 236, 245, 246.]

⁶ 8 B. Mon. (Ky.) 634.

there is a distinct agreement that the application is a part of the contract, and the statements in the application, upon which the contract is based, are expressly declared to be warranties, the insured's intent to bind himself to the exact truth in his answers, even as to immaterial facts, is adequately manifested, and the parties themselves thereby agree upon the materiality of the things warranted. *Burritt v. Saratoga County M. F. Ins. Co.*, 5 Hill (N. Y.), 188; *Armour v. Transatlantic F. Ins. Co.*, 90 N. Y. 450; *O'Shaughnessy v. Working Women's Co-op. Ass'n*, 28 N. Y. S. 761; *American Credit Indemnity Co. v. Carrollton F. M. Co.*, 95 Fed. Rep. 111; *Mutual L. Ins. Co. v. Nichols* (Tex. Civ. App.), 24 S. W. 910. If the insurers put no question

upon a particular subject, such as the nature and amount of incumbrances, otherwise than by mortgage, they cannot object that no information is given on that subject. *Hosford v. Germania Fire Ins. Co.*, 127 U. S. 399; *American Artistic G. S. Co. v. Glenn Falls Ins. Co.*, 20 N. Y. S. 646. And although a policy of insurance in a mutual fire insurance company contains terms and conditions not included in the application therefor, if they are not unusual or extraordinary, this does not render necessary the acceptance of the policy by the assured in order to make it binding on him, but the contract becomes complete on the delivery of the policy, without any further assent on his part. *Commonwealth Mut. F. Ins. Co. v. Knabe Co.*, 171 Mass. 265.

were indisposed to admit that the principle which converts into a warranty every matter of fact or description relative to the property insured, which the parties have inserted in the policy, is applicable in cases of fire insurance to any such matter not inserted in the policy nor written upon it, though it be referred to therein as a part of the policy, even if it be the rule in marine insurance, which was doubted. (a) Nor can a reference in a new policy to a former survey at the office of the agent through whom a foreign insurance had been effected, be considered as bringing that survey into the new contract as a "survey on file at the office," so as to make it a part of the new contract, there being no new application or survey or plan presented or filed at the office.¹ Upon the same general principles, a party who accepts a policy "in reference to a survey on file at the office," the by-laws making "survey, plan, and description" "a warranty on the part of the insured," is not responsible for executory representations contained in the application, of which the survey formed a part, it appearing that the application was never signed by the insured, nor by any one authorized by him so to do. While, having accepted the policy subject to the survey, he will be held responsible for the accuracy of that, yet a survey imports only a plan and description of the present existing state, condition, and mode of use of the property, and does not by fair intentment embrace statements or representations of a promissory or executory nature relating to contemplated alterations or improvements in the property, or to the mode in which the premises are to be occupied during the continuance of the policy; and for these latter, not being shown to have recog-

¹ *Clinton v. Hope Ins. Co.*, 45 N. Y. 454.

(a) Now, in Kentucky, by a statute enacted in 1874, all the statements in the application are to be held merely representations, and not to avoid the policy unless material or fraudulent. See *Germania Ins. Co. v. Rudwig*, 80 Ky. 223, 234. This statute does not

apply to an application made out in Kentucky and accepted in New York, if Kentucky is not made the place of performance. *American Credit Indemnity Co. v. Carrollton F. M. Co.*, 95 Fed. Rep. 111, 113.

nized or adopted them, he is not responsible.¹ But the applicant is presumed to know the contents of the paper he signs, and, when it is permissible to show the contrary, the burden of proof is on him who alleges ignorance.²

§ 160. **Qualified Reference.** — And where the language of reference is qualified, and does not clearly intend to make the application a part of the policy, the doubt will be construed against the company. Thus, "reference being had to the application for a more particular description, and the conditions annexed, as forming a part of the policy," has been held to import the conditions into the contract, but to leave the statements in the application without to stand upon the footing of representations, being referred to merely for the purpose of describing and identifying the property insured.³ So if the statements, alleged to be warranties, are declared to be true so far as risk and value are concerned, they are warranties as to these particulars, but representations as to others.⁴ So if the provisions of the policy are contradictory, or so framed as to leave room for construction.⁵

§ 161. **Qualified Reference; Knowledge; Belief.** — So, although the application be expressly made a part of the policy, its statements will not be regarded as warranties if qualified by other stipulations in either which afford a fair inference that the parties themselves did not so intend them. The by-laws may provide that the application shall be a part of the policy and "a warranty on the part of the insured," and that "the policy shall be void unless the applicant shall make a correct description and statement of all facts in-

¹ *Denny v. Conway Stock & Mut. Fire Ins. Co.*, 13 Gray (Mass.), 492; *Lycoming Ins. Co. v. Jackson*, 83 Ill. 302; *Albion Lead Works v. Williamsburgh Fire Ins. Co.*, C. Ct. (Mass.), 9 Ins. L. J. 435; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454.

² *Hartford Life Ins. Co. v. Gray*, 80 Ill. 28; s. c. again before the courts, 8 Ins. L. J. 611; *Hanson v. Milwaukee, &c. Ins. Co.*, 45 Wis. 321; *Andes Ins. Co. v. Shipman*, 77 Ill. 189; *Chatillon v. Canadian, &c. Ins. Co.*, 27 U. C. (C. P.) 450.

³ *Trench v. Chenango County Mut. Ins. Co.*, 7 Hill (N. Y.), 122.

⁴ *Howard Fire & Mar. Ins. Co. v. Cornick*, 24 Ill. 455; *Lindsey v. Union Mut. Ins. Co.*, 3 R. I. 157; *Wilson v. Standard Ins. Co.*, U. C. (C. P.) 15 Can. L. J. N. s. 32.

⁵ *National Bank v. Insurance Co.*, 95 U. S. 673.

quired for in the application, and also all other facts material in reference to the insurance, or to the risk;" yet, if in the application it is agreed that it is "a correct description of the property so far as regards the condition, situation, value, and risk on the same," or so far as is known to the applicant or is material to the risk, and that "the misrepresentation or suppression of material facts" shall destroy the applicant's claim for damages, — these latter stipulations, when construed together with the former, being not only unnecessary, if the assured is to be held to the literal and exact truth of his answers, but inconsistent with holding them to be strict warranties, reduce the answers to the quality of representations.¹ These cases afford a good illustration of the over-caution in which insurance companies sometimes indulge, as well as of the great importance, in the construction of the contract of insurance, of carefully comparing the several stipulations with each other.² So, too, reference in the proposal for a reinsurance to the statements made in the proposal for the original insurance as believed to be true, is no warranty of their truth, but simply a warranty of the belief in their truth.³ [An acknowledgment at the end of an application warranting the foregoing statements "to the best of my knowledge and belief" qualifies the undertaking that the statements are "in all respects true," and that any "untrue or fraudulent statements" should forfeit the insurance.⁴ When a policy expressly makes the application a part of it, and all the answers therein warranties, it must be held to mean such warranties as are stipulated for in the application, and where the application declares that the answers are true "so far as the same are known and are material," this clause qualifies the nature of

¹ *Elliott v. Hamilton Mut. Ins. Co.*, 13 Gray (Mass.), 139; *Ætna Ins. Co. v. Grabe*, 6 Minn. 82; *Longhurst v. Conway Fire Ins. Co.*, U. S. Dist. Ct., Iowa, 1861, cited in *Bates, Dig. Fire Ins. Dec.*; *Redman v. Hartford Fire Ins. Co.*, 47 Wis. 89; *Fitch v. Am. Popular, &c. Ins. Co.*, 59 N. Y. 557.

² See also *Watertown Fire Ins. Co. v. Simons* (Pa.), 9 Ins. L. J. 597; *Joyce v. Maine Ins. Co.*, 45 Me. 168; *Frisbie v. Fayette Mut. Ins. Co.*, 27 Pa. St. 325.

³ *Wheulton v. Hardisty*, 8 El. & B. 232.

⁴ [*Clapp v. Mass. Benefit Ass.*, 146 Mass. 519.]

the warranty, and changes it from an absolute to a qualified one.¹ When the applicant states in his application that the same is a just, true, full, &c., exposition so far as the facts are known to him, it is immaterial whether it be considered a warranty or a representation.² Where the insured declared that he answered to the best of his knowledge and belief, and omitted to state an accident from the results of which he was in bed five weeks, it is for the jury to say whether he wilfully withheld the facts or forgot them, or honestly thought them of too little consequence to be mentioned.³ Where the application is made a part of the policy, and "warranted by the assured to be true in all respects," but this clause is followed by the statement that "if this policy has been obtained by or through any fraud, misrepresentation, or concealment, said policy shall be absolutely null and void," immaterial answers honestly made will not invalidate the contract.⁴ But where a policy contained the clause, "The basis of the contract is said application and obligation, which shall be taken and deemed as a part of this policy, and as a warranty on the part of the assured, and any false or untrue answers and statements material to the hazard of the risk shall render the policy null and void." It was held that the application being made a part of the policy the answers in it became warranties, and if untrue avoided the policy whether material or not.⁵ This decision is not in accord with the liberal spirit which seizes every indication that the parties meant to exclude forfeitures for *immaterial errors*, there being no fraud. Honest errors manifestly and undoubtedly immaterial *ought* to be excluded by the law.]

§ 162. **Constructive Warranties not favored.** — The courts will hold a stipulation, whether contained in the policy or in the application, to be a representation rather than a war-

¹ [Redman v. Hartford Fire Ins. Co., 47 Wis. 89, 100.]

² [Mulville v. Adams, 19 Fed. Rep. 887, 890.]

³ [Miller v. Confederation Life Ass. Co., 11 Ont. R. 120 (affirmed, 14 Can. S. C. R. 330).]

⁴ [Continental Life Ins. Co. v. Rogers, 119 Ill. 474.]

⁵ [Chrisman v. State Ins. Co., 16 Or. 290, citing many cases.]

ranty, when there is room for doubt, from ambiguity of language or otherwise.¹ Thus, where the policy was made with reference to the conditions annexed, but these were referred to not as conditions precedent, nor as forming part of the policy, but “for a more particular description,” or “to be used and resorted to in order to explain the rights and obligations of the parties, in cases not otherwise specially provided for,” the court said these were merely the statements of a collateral document, which both parties agreed to as an authoritative exposition of what they both understood as the facts, on the assumption and truth of which they contracted, and the relations in which they stood to each other.² So the words “on condition” do not necessarily import a condition precedent equivalent to a warranty, since the manner and circumstances under which they are used may indicate that such was not the purpose or intent. Thus where the words, “on condition that the applicant take all risk from cotton waste,” were used not in the same context with the other conditions, but inserted between the statement of the amount insured and the statement of the *locus* of the property, it was held that these words so used did not constitute a condition in the legal sense, as there was nothing which the insured

¹ [The courts lean toward construing answers as representations, not as warranties. *Schwarzbach v. Protective Union*, 25 W. Va. 622, 653; *Moulor v. Amer. Life Ins. Co.*, 111 U. S. 335. Unless it is shown by the form of the contract that the parties intended a given statement to be taken as a warranty, it will be construed as a representation, and substantial truth will be enough. *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183. The clearest and most unequivocal language is necessary to create a warranty. All statements of doubtful meaning will be construed as representations merely. *Ala. Gold Life Ins. Co. v. Johnston*, 80 Ala. 467; *Merchants' & Mechanics' Ins. Co. v. Schroeder*, 18 Brad. 216. And where one part of the policy tends to show an intent to make the answers warranties, and another part treats them as representations, they will be treated as representations, or if warranties at all, at least only to the extent of an honest belief in their truth. *Id.* See *Northwestern Benevolent & Mut. Aid Ass. v. Cain*, 21 Brad. 471, for a discussion of cases in which stipulations are held representations and not warranties.]

² *Daniels et al. v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 426; *Westfall v. Hudson River Fire Ins. Co.*, 2 Duer (N. Y. Superior Ct.), 490. See also *Delonguemare v. Tradesmen's Ins. Co.*, 2 Hall (N. Y. Superior Ct.), 589; *Trench v. Chenango County Mut. Ins. Co.*, 7 Hill (N. Y.), 122; *Wilson v. Conway Ins. Co.*, 4 R. I. 141. The early case of *Duncan v. Sun Fire Ins. Co.*, 6 Wend. (N. Y.) 488, to the contrary, seems not to have been well considered.

or any other party was to do or omit, by way of performing the supposed condition, and no event was to happen that it might be saved. They amount simply to a declaration on the part of the insurers that they will not pay a loss by fire originating in cotton waste.¹

§ 163. **Constructive Warranties** (*continued*). — Some observations upon this point fell from the court in a case in Kentucky, which are worthy of note, and which, though their spirit has in too many instances been departed from, may be considered as illustrative of the present tendency of judicial decision. "Whatever might be the doctrine in case of marine policies," says Marshall, C. J., "in making which the insurer is in general wholly dependent upon the statements of the insured, with regard to the property and the risk, it has been seriously doubted, and, so far as we know, has not been established by judicial decisions, whether the principle of construing every matter of mere description contained in the body of the policy into a warranty should be applied with the same strictness to *fire policies*, where the misdescription is most generally the mistake of the underwriter's own surveyor. These warranties being conditions precedent, which must be performed or be true, however immaterial, there is an obvious propriety that they should be contained in the policy, which is to be kept by the insured, not only that he may be enabled to make the proper averments when he comes to declare, but that he may be fully apprised of the effect intended to be given to his statements; since if they are considered merely as representations, it is sufficient that they were made without fraud, and are substantially true in every point material to the risk."²

¹ *Kingsley et al. v. New England Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 393.

² The opinion proceeds: "Under these considerations, we are of opinion that it is at least safe to conclude that the reference in this policy to the application and survey as a part thereof, being a part of the clause which vacates the policy if the premises should, at the time of any fire, be occupied for purposes more hazardous than at the date of the instrument, should be understood as merely identifying the description and condition of the property at that time, for the standard of comparison in case of fire; that no other force or effect was intended to be given to the writings referred to, than as being a description of the nature or purposes of the occupation of the building at that time; and that as the clause

§ 164. **Constructive Warranties** (*continued*). — It thus becomes apparent that, though the statements and stipulations on the part of the insured are inserted, or are referred to, in the policy itself, it often becomes difficult to determine whether they are warranties or representations. They are not necessarily warranties because they appear on the face of the policy. In order to have the force of a warranty, the statement must indeed constitute a part of the contract; but it by no means follows that every statement which constitutes a part of the contract is therefore a warranty.¹ Whether they are so or not will depend upon the form of

points expressly to the sort of variance against which it intends to guard (*viz.* a more hazardous occupation), and declares expressly the consequences of such variance, these declarations should be regarded as expressing the entire scope and object of the reference, beyond which it cannot be carried without violating the apparent intention of the parties. The entire clause, including the reference to the application and the survey, was intended to secure the insurers from loss by a change in the occupancy of the premises which should increase the risk, and not to bind the other party to the truth of immaterial statements not affecting the risk, nor to preclude him from changes either in the plan or occupation of the premises, unless the hazard should be thereby increased. And the written application and survey were referred to as fixing the standard of comparison, and not for the purpose of creating or evidencing any covenant or warranty on the part of the insured, as to the condition or occupation of the premises at the time the insurance was made. The only covenant or warranty on this subject is contained in that part of the policy which describes the building as a mansion-house situated, &c., and states that it was then occupied as a dwelling-house." *Kentucky & Louisville Mut. Ins. Co. v. Southard*, 8 B. Mon. 634, 637. See also *Worswick v. Canada, &c. Ins. Co.*, Ct. of App. Ont., 9 Ins. L. J. 299. And the statute of Massachusetts (Stat. 1864, c. 196, § 1), which is as follows: "In all insurance against loss by fire hereafter made by companies chartered or doing business in this Commonwealth, the conditions of the insurance shall be stated in the body of the policy, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty or part of the contract except so far as they are incorporated in full in the policy, and so appear on its face before the signatures of the officers of the company," was but a legislative expression of the judicial tendency at that time. And now the courts seem to have addressed themselves to the question, how far what is expressly stated in the policy, and is made part of the contract, is necessarily a warranty, with the evident disposition to restrict the effect of such an express statement in the policy to material and substantial matters affecting the risk. See as to statutes of other States, *post*, § 180 *a*.

¹ [It has been held that a stipulation in a policy to keep all openings of the building closed, is not a warranty, because it is not on express penalty of forfeiture, and therefore negligence of the assured must be shown in allowing the openings to be unclosed. *Eakin v. Home Ins. Co.*, 1 Tex. App. Civ. Cas. § 370.]

expression used, the apparent purpose of the insertion, and sometimes upon the connection or relation to other parts of the instrument. So, also, if the statements contained in a separate paper are referred to and made part of the contract, yet if the reference appear to be made for a special purpose, and not with a view to import the separate paper into the policy as a part of the contract, the statements will not thereby be transformed from representations into warranties. Warranties can only exist upon the fair interpretation and clear intendment of the words of the parties, and, since courts will not favor warranties by construction, they will not be bound when, from the form of the expression used, or other reason, there appears to be no intention to enter into them. Parties will not be held to have entered into the contract of warranty unless they clearly intended it; and if the policy itself does not distinctly identify and refer to the application, and make it a part of the contract, though the application refers to the policy as containing a warranty, or if the reference in the policy to statements contained in another paper do not clearly show that the reference is made for the purpose of giving to the statement so referred to the force and effect of warranties, as if they be referred to as "statements" or "representations," or if the reference appear to be made for another purpose, or if the purpose be doubtful, — such reference will not convert the statements into warranties.¹ In *Houghton v. Manufacturers' Mutual Fire Insurance Company*,² it was held that though the application was by reference made part of the policy, yet as the statements in the application were referred to as representations, and so denominated in that clause of the policy which referred to them, they were to be treated as such, and to be

¹ *Conover v. Mass. Mut. Life Ins. Co.*, C. Ct. (Mo.) 3 Dill. 217; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Miller v. Mut. Benefit Life Ins. Co.*, 31 Iowa, 216; *Blood v. Howard Fire Ins. Co.*, 12 Cush. (Mass.) 472; *Towne v. Fitchburg Ins. Co.*, 7 Allen (Mass.), 51; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72; *Snyder v. Farmers' Ins. & Loan Co.*, 13 id. 92; *Wilson v. Conway*, 4 R. I. 141; *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y. Superior Ct.), 632; *Kentucky & Louisville Mut. Ins. Co. v. Southard*, 8 B. Mon. (Ky.) 634; *American Popular Life Ins. Co. v. Day*, 39 N. J. (Law) 89.

² 8 Met. (Mass.) 114.

regarded rather as having the legal effect of representations than of warranties, as understood in the law of marine insurance, though partaking in some measure of the character of both. They are like representations in requiring that the facts stated shall be substantially true and correct, and, so far as they are executory, that they shall be substantially complied with; but not like warranties in requiring an exact and literal compliance. And when it is said that the statements in an application referred to as forming a part of the policy are by that reference imported into the policy and become warranties, and, like warranties, must be literally true and exactly complied with, it is apparent from the cases just cited, and from many others, that the language of the courts in their assertion of the rule is somewhat more positive and vigorous than is justified by the manner in which the rule, thus strongly and positively asserted, has been illustrated by practical application. In truth, the courts have apparently begun to see that they have gone far enough, under the lead of arbitrary rules, in finding constructive warranties in the immaterial, unguarded, and oftentimes superfluous statements contained in the application.¹

§ 165. **Constructive Warranties** (*continued*). — The case of *Campbell v. New England Mutual Life Insurance Company*² was cited and approved (after quoting from it largely) in *Price v. Phoenix Mutual Life Insurance Company*,³ upon the point that statements contained in the application will not be held to be warranties, whether referred to and made part of the policy or not, if elsewhere in the contract there can be found reason to suppose that such was not the clear understanding and intent of the parties, and seems to have been regarded, not justly as it seems to us, by the court in the latter case as irreconcilable with prior cases in Mas-

¹ *Boardman v. N. H. Mut. Fire Ins. Co.*, 20 N. H. 557; *Hough v. City Fire Ins. Co.*, 29 Conn. 10; *Billings v. Tolland Co. Mut. Fire Ins. Co.*, 20 Conn. 139; *Watertown Fire Ins. Co. v. Simons* (Pa. St.), 9 Ins. L. J. 597; *Virginia Fire & Mar. Ins. Co. v. Kloeber*, 31 Va. 749.

² 98 Mass. 381.

³ 17 Minn. 497. See also *Hurd v. Masonic Mut. Ben. Soc.*, 6 Ins. L. J. 792; *ante*, § 160.

sachusetts. It was, however, justly regarded as very decisively indicating the purpose of that court to confine constructive warranties within stricter limits, and beyond question as irreconcilable with numerous *dicta* both in that court and others, which have often had too-much influence in deciding adjudged cases. In the latter case there was no material respect, upon the point under consideration, in which the contract differed from that in the Massachusetts case, the court regarding the fact that in one case the statement was made "the basis of the policy," while in the other the policy was declared to be issued "upon the faith" of the statements as immaterial. And independently of the authority of that case, as the result of a "painstaking examination," the court arrived at a clear conclusion that what the parties themselves designate as "representations," "declarations," or "statements" cannot be converted into warranties by being imported into, and made part of, the contract.¹ In those States where the principles of equity are to a considerable extent adopted and enforced in the courts of common law these observations have a special application.

[§ 165 A. **Seaworthiness, implied Warranty.** — The mere fact of effecting marine insurance impliedly warrants that the vessel at the commencement of the voyage is seaworthy, *i. e.*, that its materials, construction, captain and crew, tackle, sails, rigging, stores, equipment, and outfit generally are such in quantity and quality as to render it fit to encounter with safety the ordinary perils of the proposed voyage or service. The warranty extends to hidden defects

¹ The court cited with approval the judicious observations of Mr. Phillips, 1 Ins. § 638 : "The cases would have presented few difficulties of construction if the early jurisprudence had been less open to the admission of forfeitures of the policy, and more easily satisfied with a compliance with written stipulations substantially equivalent to a literal one, when such a construction was not inconsistent with the express provisions of the contract. The recent jurisprudence tends to greater liberality of construction in favor of maintaining the contract. Such a rule may as well be applied to stipulations and recitals in the policy as to representations preliminary and collateral to it; and it is more equitable after the policy has gone into effect, and the underwriter has a right to retain the premium, that the contract should be continued in force as long as its being maintained is consistent with its express provisions, and the underwriter is not thereby prejudiced."

as well as those that are known, and the burden of proof is on the insured.¹ "Seaworthy" means fit to resist ordinary perils of voyage.² Payment of loss is an admission of seaworthiness.³ Where a vessel puts back into port by reason of a storm and insures without speaking of the storm, the burden of proving seaworthiness is shifted to the assured.⁴

§ 166. **Ambiguous and Unanswered Questions; Superfluous Answers.** — Where the language of the questions contained in the application is ambiguous or indefinite, or calls for answers which may be to some extent a matter of opinion, so as to admit of different answers, if the insured answer in good faith in some proper sense, and when the application is unintentionally defective in a matter known to the insurers or their agent, the insured will be excused though he do not give the desired answer.⁵ And though the insured do not answer certain questions at all, and give a negative answer to a general question as to his knowledge of any other circumstances affecting the risk, such answer cannot be made applicable to another question in the same application, which is unanswered, but which if negatived would be untruly answered; nor will the failure to answer at all vitiate the policy. The issuing of a policy on an application which without fraud contains no answer to certain questions is a waiver of answer to those questions, even though in answer to another question the insured may have said there were "no other circumstances affecting the risk;" and to avoid the policy in such cases the insurers must prove untrue statements other than those inquired about.⁶ If the

¹ [Rogers v. Sun Mut. Ins. Co., 46 N. Y. Super. 65.]

² [The Orient, 16 Fed. Rep. 916, 5th Cir. La., 1883.]

³ [Standard Sugar Refinery v. The Centennial, 2 Fed. Rep. 409, Dist. of Mass. 1880.]

⁴ [Batchelder v. Ins. Co. of N. A., 30 Fed. Rep. 459 (Pa.), 1887.]

⁵ Wilson v. Hampden Fire Ins. Co., 4 R. I. 159; Campbell v. Merchants' & Farmers' Mut. Fire Ins. Co., 37 N. H. 35; Cumberland Valley Mut. Prot. Co. v. Schell, 29 Pa. St. 31. And see *post*, §§ 193, 202, 210, 296; World Mut. Life Ins. Co. v. Schultz, 73 Ill. 586; Illinois Mason's Soc. v. Winthrop, 85 Ill. 537.

⁶ Liberty Hall Ass. v. Housatonic Mut. Fire Ins. Co., 7 Gray (Mass.), 261; Newman v. Springfield, &c. Ins. Co., 17 Minn. 123; Lorillard Fire Ins. Co. v. McCulloch, 21 Ohio St. 176. In Haley v. Dorchester Mut. Fire Ins. Co., 12 Gray (Mass.), 545, the policy provided that unanswered questions should be con-

company accepts an indefinite or insufficient answer, it will be construed liberally in favor of the insured; as where a question as to how the premises are occupied is answered, "dwelling, &c.," this will be held as notice that a saloon is kept there.¹ If the answer be responsive and true in part, but irresponsible and untrue in part, this last will be only a representation. It must be material in order to avoid the policy.² If the interrogatory be modified by the phrase, "so far as you know," this holds the interrogated party not to answer absolutely, but to the best of his knowledge and belief.³ If the answer be superfluous and immaterial, it has no binding force.⁴ If a question is not answered, there is no warranty that there is nothing to answer; and where there is but a partial answer, the warranty cannot be extended beyond what is answered. Warranty must be based upon the affirmation of something not true.⁵

§ 167. **Application not essential.** — The recital in the policy that it is based upon an application does not make the application essential. A policy so stating, but issued without any written application, is as valid as if issued upon the written application;⁶ but its references to the application have no force or effect.⁷ When there is no application, the

strued as if answered favorably to the insurers, on the question of risk. *Bardwell v. Conway Mut. Fire Ins. Co.*, 122 Mass. 90; *American Ins. Co. v. Paul* (Pa.), 9 Ins. L. J. 569, 571; *Bennett v. North British, &c. Ins. Co.* (N. Y.), id. 585; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; *Dohn v. Farmers', &c. Ins. Co.*, 5 Lans. (N. Y.) 275; *Forbes v. Edinburgh Life Ins. Co.*, 10 Ct. of Session Cas. (Scotch) 451. This case holds that if the failure to answer involves a deliberate concealment of a fact known to be material, it will be fatal to the right to recover. See also *Rowe v. London, &c.*, and *Davis v. Scottish, &c.*, cited in next note; *post*, §§ 176, 198.

¹ *Gouinlock v. Mannf. & Mer. Mut. Fire Ins. Co.*, 43 U. C. (Q. B.) 563; *Rowe v. London, &c. Ins. Co.*, 12 U. C. (Ch.) 311; *Davis v. Scottish Prov. Ins. Co.*, 16 U. C. (C. P.) 176.

² *Buell v. Conn. Mut. Life Ins. Co.*, C. Ct. (Ohio) 5 Ins. L. J. 274; *post*, § 170.

³ *Ætna Ins. Co. v. Grube*, 6 Minn. 82; *Cheever v. Union, &c. Life Ins. Co.* (Superior Court, Cincinnati), 5 Ins. L. J. 159.

⁴ *Buell v. Conn. Mut. Life Ins. Co.*, C. Ct. (Ohio); 5 Big. Life & Acc. Ins. Cas. 473.

⁵ *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256.

⁶ *Blake v. Exch. Mut. Ins. Co.*, 12 Gray (Mass.), 265.

⁷ *Newman v. Springfield Fire & Mar. Ins. Co.*, 17 Minn. 123; *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136.

insured is bound by the conditions of the policy which he accepts and holds without objection. That he never read it is not the fault of the insurers.¹

§ 168. **Application may limit and control the Language of the Policy.**²—If the policy provides that if any statement contained in the declaration (which is made part thereof) be untrue, the policy shall be void, and the declaration itself proceeds to say that the particulars “are correct and true throughout,” and if it shall hereafter appear that “any fraudulent concealment or designedly untrue statement be contained therein,” *i. e.* in the above-written particulars, the policy shall be void, —not every untrue statement, but only a designedly untrue statement will avoid the policy. The two clauses, parts of the same instrument, must be taken together, and if any doubt arises as to their construction, that doubt must be construed against the insurers who prepared the instrument.³

¹ *Swan v. Watertown Fire Ins. Co. (Pa.)*, 10 Ins. L. J. 392.

² [See § 161.]

³ *Fowkes v. Manchester & London Life Ass. & Loan Assoc.*, 3 B. & S. (Q. B.) 917. “The declaration,” says Cockburn, C. J., in his opinion, “is ‘that the particulars given in answer to the question propounded by the company are correct and true throughout;’ that the proposal and declaration shall be the basis of the contract. ‘And if it shall hereafter appear that any fraudulent concealment or designedly untrue statement be contained therein, then all the moneys which shall have been paid on account of the assurance made in consequence hereof shall be forfeited, and the policy granted in respect of such assurance shall be absolutely null and void.’ It is sought, on the part of the defendants, to construe this declaration in the disjunctive, so that not only if any fraudulent concealment or designedly untrue statement is contained in the answers to the question the policy is to be void and the premiums forfeited, but that if any incorrect or untrue statement, however honestly and sincerely made in the belief of its truth, occur in those answers, the same consequences are to follow. The first observation in answer is that, upon that construction, the clause which relates to fraudulent concealment, and designedly untrue statement, is superfluous and unnecessary, because it is only a reiteration *in extenso* of that which is involved in the former clause, which requires the particulars to be correct and true. In construing an instrument prepared by the company, and submitted by them to the party effecting the insurance for his signature, it ought to be read most strongly *contra proferentes*; and inasmuch as, upon the construction contended for, the latter clause is wholly unnecessary, I think we ought to construe that clause as merely explanatory of what is meant by ‘correct’ and ‘true’ in the former clause. A layman about to effect an insurance would read such a document, when submitted to him for his signature, in the following sense: ‘I agree that my answers to the questions propounded to me by the company shall be the

§ 169. **Limitation of Policy by Application** (*continued*). — In further illustration of this point may be cited the case of *Washington Life Insurance Company v. Haney*,¹ where it

basis of the contract between us; that is to say, if I am guilty of any fraudulent concealment, or designedly untrue statement in those answers, the policy shall be null and void, and not only that, but the premiums shall be forfeited.' Then it is said that if we turn from the declaration to the policy, we shall find that the language of the policy varies from the declaration; and it is argued that the policy is the true statement of the contract between the parties. But the declaration is declared to be as much a part of the policy as if it had been set forth therein; and the language of the policy is, that if any statement in the declaration is 'untrue,' the policy shall be void, and all moneys paid in respect thereof be forfeited. To ascertain the meaning of the words, 'if any statement in the declaration is untrue,' we must refer to the declaration itself, which is made the basis of the contract; and reading those words with the light thrown upon them by the language in the declaration, I think the true construction of the language of the defendants is, that, in order to avoid the policy, the statement must be designedly untrue; that is, untrue to the knowledge of the assured." See also *Sinclair v. Phoenix, &c. Ins. Co., C. Ct. (Minn.)*, 9 Ins. L. J. 523.

¹ 10 Kansas, 525. The opinion of the court upon this point was as follows: "The policy was issued and accepted by the assured upon the following amongst other express conditions and agreements, to wit, 'If any of the statements or declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue.' . . . 'Then in every such case the said company shall not be liable for the payment of the sum insured, or any part thereof, and this policy shall be null and void.' We do not understand the clause, 'upon the faith of which this policy is issued,' as limiting this condition to a portion of the application, or any particular statements therein. It does not mean to imply that there are certain statements which must be true because the policy is based upon them, while others are immaterial. It means that the policy is issued upon the faith of the whole application, with all its statements and declarations, and that if any of them are untrue the policy is avoided. We must therefore consider the application as a whole, and each party has a right to have it so considered. If the application propounds certain questions and indicates in what manner they must be answered, it is enough that they are answered in that manner, and when the policy is based upon the statements and declarations of the application, it is based upon them made in the manner and under the rules laid down by the company in the application. If we turn now to the application we find under the head 'Instructions in filling up this application,' 'First, answer each of the questions on the first page to the best of your knowledge and belief, briefly but explicitly;' and at the close of the questions and answers of the applicant, and just before her signature, is the following: 'It is hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that the above statements shall form the basis of the contract for insurance, and also that any wilfully untrue or fraudulent answers, any suppression of facts in regard to the party's health, or neglect to pay the premium on or before the day it becomes due, will render the policy null and void, and forfeit all payments made thereon.' While the policy for its validity requires truthfulness in the statements

was held to be a presumption of law that an insurance policy is based upon the application. The two papers must be construed together. And the use of a word, "residence," for instance, in the application, referring clearly to a permanent abode, will not be held elsewhere in the policy to mean a temporary sojourn.¹ [When an order showed the "intention of the plaintiffs to have been to insure" goods in a different way from that which the terms of the policy would imply, it has been held that it "controlled and explained the expressions of the formal policy," and that the mistake of the clerk therein should be rectified according thereto.²]

§ 170. **No Implied Warranty as to Matter immaterial to the Risk.** — While it is true that if a fact be in plain terms expressly warranted, its materiality to the risk is of no importance, and it becomes a condition precedent, although entirely immaterial; yet where a circumstance is sought to be included by implication in the warranty, it is not to be supposed that the parties intended to include it, unless it be manifestly material to the risk.³ In this way the question of materiality may sometimes arise, even under a warranty, or rather as aiding in determining the question whether what appears to be, and in point of form is, a warranty, is so in point of fact. Thus in *Anderson v. Fitzgerald*,⁴ where the policy was to be void "if any false statement in or about the effecting or obtaining that insurance" were made, it was said by Parke, B.: "It is true that the materiality of these statements may be sometimes evidence of the purpose with which they were made, and may tend to show that they were

of the application, it is enough if they are true according to the degree and conditions of truthfulness required by the application. This is all the parties want when they speak of truthfulness in the policy; to presume otherwise, and suppose that the company meant one degree of truthfulness in the application, and another in the policy, is to impute a dishonesty which the law will never presume, and, if shown to exist, will never sustain."

¹ *Mobile Life Ins. Co. v. Walker*, 58 Ala. 290.

² [*Norris v. Ins. Co. of North America*, 3 Yeates (Pa.), 84, 91]

³ *O'Niel v. Buffalo Fire Ins. Co.*, 3 Comst. (N.Y.) 122; *Swick v. Home Life Ins. Co.*, 2 Dill. C. Ct. (Mo.) 160; *Appleton Iron Co. v. British Am. Ass. Co.*, 46 Wis. 23.

⁴ 4 H. of L. Cas. 484.

made with the object of obtaining the policy, because if immaterial they would not be likely to effect it; but the materiality is not a necessary condition to bring them within the scope of the proviso, if it be shown that the statements were made in obtaining the policy and for the purpose of effecting it." A warranty will in no case be extended by construction, nor will it be made to include anything not clearly within its terms.¹ And it will be construed strictly against those for whose benefit it is made, when it imposes burdens upon others;² and so, if possible, as to avoid a forfeiture.³ When, however, the truth of all the statements in the application is made a condition precedent, the reciting a portion of them only in the policy will not have the effect to reduce those not recited from the quality of warranties to that of representations.⁴ And where a policy insures the holder against death or injury by 'violent and accidental means within the meaning of this contract and conditions,' and the conditions annexed specify certain modes of injury or death which the policy did not cover, this exclusion does not operate to enlarge the scope of the words "violent and accidental means," so as to include all modes of injury and death by violence and accident not embraced in the exclu-

¹ *Blood v. Howard Fire Ins. Co.*, 12 Cush. (Mass.) 472; *Shepherd v. Union Mut. Fire Ins. Co.*, 38 N. H. 232; *Rann v. Home Ins. Co.*, 59 N. Y. 387.

² *Catlin v. Springfield Fire Ins. Co.*, 1 Sum. (U. S. C. C.) 434.

³ *Ripley v. Etna Ins. Co.*, 29 Barb. (N. Y.) 552. [The courts will save a forfeiture if possible fairly to do so, and if dividends were earned by the company before default and are applicable to the policy, equity will compel their application to satisfy premium notes. *Franklin Life Ins. Co. v. Wallace*, 93 Ind. 7. Every condition to defeat any interest must be construed strictly against its maker. *Lawe v. Hyde*, 39 Wis. 345, 360. And will not be enforced unless there is the clearest evidence that this is the meaning of the contract. *Schunck v. Gegenseitiger Witten und Waisen Fond*, 44 Wis. 369, 372; *Livingston v. Stickle*, 7 Hill, 253, 256; *Carson v. Jersey City Ins. Co.*, 43 N. J. 300; *Bonenfant v. Insurance Co.*, 76 Mich. 653. Only when no other construction is permissible by the language, will a forfeiture result. *Darrow v. F. F. Soc.*, 116 N. Y. 537. An especial strictness against the company will be observed in construing clauses which restrict its liability, excuse payment of a *bona fide* loss, or work any forfeiture. *Germania Fire Ins. Co. v. Frazier*, 22 Brad. 327. A forfeiture because a member neglects his *Easter duties* will be very carefully scrutinized and rejected if possible. *Matt v. Roman Catholic Mut. Prot. Soc.*, 70 Iowa, 455.]

⁴ *Scales v. Scanlan*, 6 Irish (Law), 367, by a divided opinion.

sion, or any modes not fairly within the meaning of the words.¹ But statements and stipulations not required by the conditions of the contract, though the writing containing them is by the conditions made part of the policy, do not constitute warranties. They are not necessary, but voluntary statements and stipulations, and if material have the force of representations.²

§ 171. **Warranties and Representations construed strictly as to their Scope.** — Warranties and representations will also be construed strictly as to their scope. Thus a warranty that a room is warmed by a stove, and that the pipe is well secured, is only a warranty that it is so warmed when warmed at all, and that the pipe is so secured when the stove is used, but not at other times.³ So a warranty that the water-tanks shall be at all times well supplied with water, as applicable to a building in process of construction, means that the tanks shall be built and filled with reasonable diligence in the course of construction.⁴ So a warranty of force-pumps, ready for use, includes a warranty that there is some power to work the pumps; but it is not a warranty that that power is the best, or the usual, or of any particular kind; nor that the pumps shall not be disabled by the fire, or shall always be in order.⁵ And a representation that there is a force-pump does not by implication include hose. The truth of the representation is completely established by the fact that there is a force-pump, and whether hose or buckets are the means by which the water delivered by the pump is made available in case of fire, not being inquired about, is immaterial.⁶ So a warranty that the property belongs to the insured is not a warranty of any particular title, or that it is unincumbered.⁷

¹ Southard v. Railway Passengers' Assurance Co., 34 Conn. 574.

² Protection Ins. Co. v. Harmer, 2 Ohio St. 452; *ante*, § 166.

³ Loud v. Citizens' Mut. Ins. Co., 2 Gray (Mass.), 221.

⁴ Gloucester Manuf. Co. v. Howard Fire Ins. Co., 5 Gray (Mass.), 497.

⁵ Sayles v. North-Western Ins. Co., 2 Curtis C. Ct. (Mass.) 612; Albion Lead Works v. Williamsburg, &c. Ins. Co., C. Ct. (Mass.), 2 Fed. Rep. 479.

⁶ Peoria Mar. & Fire Ins. Co. v. Lewis, 18 Ill. 553; Gilliat v. Pawtucket Mut. Fire Ins. Co., 8 R. I. 282. And see *post*, §§ 198, 199.

⁷ Mut. Ins. Co. v. Deale, 18 Md. 26; *post*, §§ 174-176.

§ 172. **Contracts of Insurance interpreted by the same Rules as other Contracts.** — It may be well to observe here, because there are unconsidered suggestions to the contrary, that the principles of interpretation applicable to contracts of insurance are the same as those which obtain in the case of other contracts. It is likewise to be observed, that while marine insurance was the earliest, and, till within a comparatively recent period, the almost exclusive form under which this contract came under the observation of the courts, and upon this form is based substantially that body of principles known as the Law of Insurance, all the other forms of insurance are the outgrowth of this earliest and primitive form, and are but new adaptations and applications thence elaborated, subject only to such modifications as were required by the peculiarities of the new risks assumed, and the new interests to be protected. The doctrines of marine insurance are therefore always to be resorted to and applied in the elucidation of all other kinds, unless the express provisions of the contract, or circumstances peculiar to the subject-matter, render them inapplicable, or require their qualification in order to accomplish the object for which the contract is entered into. When it is said that a contract of insurance is a contract *uberrimæ fidei*, this only means that the good faith, which is the basis of all contracts, is more especially required in that species of contract in which one of the parties is necessarily less acquainted with the details of the subject of the contract than the other.¹ Its language, says Nelson, C. J.,² “is to receive a reasonable interpretation; its intent and substance, as derived from the language used, should be regarded. There is no more reason for claiming a strict literal compliance with its terms than in ordinary contracts. Full legal effect should always be given to it for the purpose of guarding the company against fraud and imposture. Beyond this, we would be sacrificing sub-

¹ Lord Abinger, C. B., in *Cornfoot v. Fowke*, 6 Mees. & Wels. 358, in reply to the suggestion of Sir Frederic Thesiger, *arguendo*, on a question of representation that a greater degree of good faith is required in contracts of insurance than in others.

² *Turley v. North Am. Fire Ins. Co.*, 25 Wend. 374.

stance to form, — following words rather than ideas.” Indeed, a moment’s reflection will render it apparent that there is nothing in an agreement about insurance intrinsically more sacred or inviolable than in an agreement about any other subject-matter. It differs only from others in the fact that, from the nature of the contract of insurance and the relations of the parties, occasions therein more frequently arise where the rights of the respective parties depend upon the exercise of good faith. And while the older cases had oftener to deal with the want of good faith on the part of the insured, the modern ones are full of examples where the courts have been compelled to a liberal application of the doctrines of waiver and estoppel to protect the insured against defences founded on a want of good faith on the part of the insurer.¹

[§ 172 A. **Construction in General.** — Contracts of insurance are to be construed accurately and neither liberally nor severely, but without favor to either party,² to arrive at the true intent of the parties, elucidating each part of the instrument by every other part. In construing a policy the court should give it a fair and liberal interpretation, such as, under all the circumstances of the case, appears most consonant to the intention of the parties at the time the contract was made.³ The understanding of one of the parties, alone, cannot determine the meaning of the contract.⁴ Conversations between the parties at the time of making a contract, are competent evidence to show the meaning intended to be applied to a certain ambiguous term therein.⁵ Contemporaneous insurance literature, and all surrounding circumstances, will be considered in determining what the

¹ And see *post*, §§ 209–212, 296.

² [Merchants’ Ins. Co. v. Davenport, 17 Grat. 138, 145.]

³ [Riggin v. Patapsco Ins. Co., 7 H. & J. (Md.) 279, 287; Manger v. Holyoke Mut. Fire Ins. Co., 1 Holmes (U. S.), 287, 289. Facts and circumstances existing when the insurance was effected, but not stated in the policy, may be shown to prove the intention of the parties in this case as to the goods covered by the policy.]

⁴ [Montgomery v. Firemen’s Ins. Co., 16 B. Mon. (Ky.) 427, 441.]

⁵ [Gray v. Harper, 1 Story (U. S.), 574, 588.]

parties intended by the "reserve dividend plan."¹ If in the general form of policies there are conditions not applicable to the particular risk, they will be ignored. When the *reason* of a condition in the general printed form does not exist in a specific case, the condition becomes meaningless and inoperative.² A clause of exception governs the general clause to which it applies.³ When the words of a promise are doubtful they are to be construed in the sense in which the promisor knew or thought the promisee would understand them.⁴ And if the intention of the parties is doubtful, the construction is to be in favor of the promisee.⁵ In an action on a policy which said "East India Islands," parol evidence was admitted to show that the locality, though geographically not one of these, was nevertheless so considered by common repute.⁶ And the same has been held as to a part of the Baltic Sea.⁷ Proof of the course of business and dealings between the parties is admissible when the policy is ambiguous.⁸ In an action on a policy of insurance on a ship, with the words "lost or not lost," and with the subsequent warranty in the policy by the plaintiff, "Well on Dec. 9, 1874," where it appeared that the policy was signed at 3 P.M. on the day mentioned, and that the ship was lost at 8 A.M. of the same day, it was held that the defendants were liable, as the warranty covered no especial part of the day.⁹ The clause "lost or not lost" covered all days prior to Dec. 9, while the warranty was satisfied if on any part of Dec. 9th the ship was safe. It was not a warranty that the vessel was safe at the moment the policy was subscribed, but only on that day, and as parts of a day will not be reckoned, safety during the first hours of the day is

¹ [Fuller v. Metropolitan Life Ins. Co., 37 Fed. Rep. 163 (N. Y.), 1889.]

² [Grandin v. Insurance Co., 107 Pa. St. 26.]

³ [Mitchell, &c. Co. v. Imperial Fire Ins. Co., 17 Mo. App. 627.]

⁴ [Barlow v. Scott, 24 N. Y. 40, 44.]

⁵ [Marvin v. Stone, 2 Cowen, 761, 806 (covenant) ; Doe v. Dixon, 9 East, 15, 16 (grant).]

⁶ [Robertson v. Money, Ry. & Mood. 75, 77.]

⁷ [Uhde v. Walters, 3 Campb. 16.]

⁸ [Fabbri v. Phoenix Ins. Co., 55 N. Y. 129, 133.]

⁹ [Blackhurst v. Cockrell, 3 T. R. 360.]

sufficient. Construction unless there be ambiguity is for the court alone.¹ The question whether a word is “six” or “oix” in a description of premises, is for the court, not the jury.² Inspection showed clearly that the word was six. When the subjects of insurance are separately stated and separately insured, though in the same policy, a false warranty as to one does not avoid the policy as to the other.³

§ 173. **How far Proof of Usage is admissible in Aid of Interpretation.**⁴—In the early history of insurance many terms and phrases were used of doubtful meaning which required a reference to usage for the purpose of explanation. And so numerous were these doubtful terms and phrases, and so frequent was the reference to custom and usage to explain them, that so great a judge as Mr. Justice Buller is reported to have said that “in policies of insurance in particular a great latitude of construction as to usage has been admitted. By usage places come within the policy which are not expressed in words. Usage not only explains but even controls the policy.”⁵ “In all matters of trade, usage is a sacred thing.”⁶ But if that learned judge meant anything more by these expressions than that great frequency of resort to usage for the purpose of explaining ambiguities is had, he was doubtless, by some peculiarity of the cases under consideration, betrayed into unguarded expressions, not apt to fall from him, and not warranted either by the earlier or later decisions. Nevertheless, the authority of so great a man gave vogue to the impression that in this respect contracts of insurance were in some sort excepted out of the general rules applicable to other contracts. But nothing is better settled than that this impression is without foundation. The same rule of construction which applies to other instruments applies also to these. They are to be construed

¹ [Hutchison v. Bowker, 5 M. & W. 535, 540.]

² [Lapeer Ins. Co. v. Doyle, 30 Mich. 150, 160.]

³ [Holmes v. Drew, 16 Hun, 491, 492; Koontz v. Hannibal Ins. Co., 42 Mo. 126, 131.]

⁴ [See §§ 179, 180.]

⁵ Long v. Allen, cited in Park, 390.

⁶ Newman v. Cazalet, also cited in Park, 414, note.

according to the sense and meaning of the terms used; and if these are clear and unambiguous, the courts will not admit parol evidence to contradict, vary, or explain them. Their terms are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense, distinct from the popular sense, rendering it necessary to resort to extrinsic proof in order to determine in which sense they are used, and so to explain their ambiguity, or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some special and peculiar sense.¹

§ 174. **The Contract will be construed liberally in Favor of the Object to be accomplished.** — It was early held, with special reference to contracts of marine insurance, that the *strictum jus* or *apex juris* is not to be laid hold on, but they are to be construed largely for the benefit of trade and for the insured,² — a rule which, under different forms of expression, has obtained with reference to all kinds of insurance to the present day. Having indemnity for its object, the contract is to be construed liberally to that end, and it is presumably the intention of the insurer that the insured shall understand that in case of loss he is to be protected to the full extent which any fair interpretation will give.³ The spirit of the rule is, that where two interpretations equally fair may be given, that which gives the greater indemnity shall prevail. And to the same spirit is due the rule that conditions and provisos will be strictly construed against the insurers because they have for their object to limit the scope and defeat the purpose of the principal contract;⁴ and apparently contradictory clauses will be so con-

¹ Per Lord Ellenborough, *Robertson v. French*, 4 East, 130, 135. And see *post*, § 179.

² *Tierney v. Etherington*, cited 1 Burr. 348; see § 175.

³ *Dow v. Hope Ins. Co.*, 1 Hall (N. Y. Superior Ct.), 166, 174; *post*, §§ 330, 440.

⁴ *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405.

strued if possible as to reconcile them with each other, and to give to each its due force in furtherance of the main purpose of the contract.¹ Of course the different provisions of the contract must be so construed, if possible, as to give effect to each. If, therefore, the natural and obvious interpretation of one would render it nugatory, or bring it into conflict with another, while a different interpretation would reconcile the two, and give force and effect to both, the latter is to be adopted. So if the natural interpretation, looking to the other provisions of the contract, and to its general object and scope, would lead to an absurd or unreasonable conclusion, as such a result cannot be presumed to have been within the intention of the parties, such interpretation must be abandoned, and that adopted which will be more consistent with reason and probability.² And so the acts of the insurer will be so interpreted as to give form and effect to the policy, rather than the contrary; as where the insurers issue an open policy with blanks for indorsement of additional insurance, and receipts to be signed by the agent, the indorsements made and agreed on by the agent will be held valid, though the insurer did not intend he should complete a contract without reference to them, and though the policy provided for such "risks as may be agreed on, as per indorsement hereon, accepted by the company."³ The same rule will apply where, by its by-laws, the insurers have construed a provision of their charter. Though it may be erroneous, if acted upon by others, as against them the insurers cannot be allowed to question its correctness.⁴

§ 175. **Language taken most strongly against those for whose Benefit it is.** — No rule, in the interpretation of a policy, is more fully established, or more imperative and controlling, than that which declares that, in all cases, it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to the indemnity, which,

¹ Merchants' Ins. Co. v. Edmond, 17 Grat. (Va.) 138.

² See also *post*, § 247.

³ Wass v. Maine Mut. Ins. Co., 61 Me. 537.

⁴ Kentucky Mut. Life Ins. Co. v. Calvert (Ky.), 9 Ins. L. J. 529.

in making the insurance, it was his object to secure.¹(a) When the words are, without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss must, in preference, be adopted.² While courts will extend all reasonable protection to insurers, by allowing them to hedge themselves about by conditions intended to guard against fraud, carelessness, want of interest, and the like, they will nevertheless enforce the salutary rule of construction, that as the language of the conditions is theirs, and it is therefore in their power to provide for every proper case, it is to be construed most favorably to the insured.³ Thus, if a stipulation be ambiguous, and no light can be

¹ [All conditions will be liberally construed in favor of the assured. *Ala. Gold Life Ins. Co. v. Johnston*, 80 Ala. 467; *Piedmont, &c. L. Ins. Co. v. Young*, 58 Ala. 476; *Pelly v. Royal Exch. Ass. Co.*, 1 Burrows, 341, 349; *Western Ins. Co. v. Cropper*, 32 Pa. St. 351, 355. The contract will be sustained if possible, and liberally construed to secure indemnity—the object of the contract. *Phoenix Ins. Co. v. Barnd*, 16 Neb. 89; *Grandin v. Insurance Co.*, 107 Pa. St. 26; *Schröder v. Trade Ins. Co.*, 109 Ill. 157; *Lyon v. Travelers' Ins. Co.*, 55 Mich. 142; *Miner v. Mich. Mut. Ben. Ass.*, 63 Mich. 338. The courts will not draw fine distinctions nor allow the company to escape on mere technicalities. *Agricultural Ins. Co. v. Bemiller*, 70 Md. 400. The design of the assured being to provide for themselves an indemnity against loss, from which the insurers agree to protect them, such a construction should be placed on their compact as, according to the nature of the transaction, will effectuate that object. *Riggin v. Patapsco Ins. Co.*, 7 H. & J. (Md.) 279, 287.]

² *Westfall v. Hudson River Fire Ins. Co.*, 2 Duer (N. Y. Superior Ct.), 490. And see *ante*, §§ 171, 174; *post*, § 243.

³ *Western Ins. Co. v. Cropper*, 32 Pa. St. 351.

(a) Policies, notices, or contracts, when written on forms prepared by the insurer, are interpreted, in all cases of uncertainty, most favorably to the insured. *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 297; *Imperial Fire Ins. Co. v. Coos County*, 151 id. 452, 462; *Ætna Life Ins. Co. v. Smith*, 88 Fed. Rep. 440, 444; *Mass. Benefit Life Ass'n v. Robinson*, 104 Ga. 256. So words and clauses, when ambiguous in meaning, are construed against the insurer, who uses them, so as to validate the indemnity promised by the policy and not destroy it. *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 462; *London & L. Fire Ins. Co. v. Fischer*, 92 Fed.

Rep. 500; *Canton Ins. Office v. Woodside*, 90 id. 301, 305; *Janneck v. Met'n L. Ins. Co.*, 162 N. Y. 574; *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39. If clear and unambiguous in meaning, their construction is for the court, and their terms are taken and understood in their plain, ordinary, and popular sense. *Ibid.*; *Liverpool, &c. Ins. Co. v. Kearney*, 36 C. C. A. 265; 270; *Fred. J. Kiesel & Co. v. Sun Ins. Co.*, 88 Fed. Rep. 243; *Thurston v. Burnett, &c. Ins. Co.*, 98 Wis. 476. Insurance policies are always given a reasonable construction, such as will fairly carry their provisions into effect. *Springfield F. & M. Ins. Co. v. McLimans*, 28 Neb. 846.

thrown upon it in accordance with the received principles of law, from extrinsic evidence, the doubt is to be resolved against the party by whom and in whose favor the stipulation is made.¹ The words of a promise, with its exceptions and qualifications, are to be considered as those of the promisor, while those of a representation on which the promise is founded are the words of the promisee. If a question be equivocal, so that it is susceptible of being answered in more than one way, and differently from different points of view, it will not be open to the company which prepares the question to object that it is not answered in the true sense.² Thus the question whether one has suffered any serious injury might be answered in the affirmative if regarded in the light of the severity of the suffering and temporary inconvenience occasioned at the time. But looked at afterwards, and after a permanent and complete recovery, it may well be answered in the negative, so far as the injury is material to the question of the value of a life risk.³ So an incidental communication from the insurer to the insured will be deemed to contain not only all the language expresses, but all that can be fairly deducible therefrom in the light of the circumstances under which it is made. Thus,

¹ [An ambiguous policy shall be construed most strongly against the insurer and liberally in favor of the assured. *Brink v. Merchants' & Mechanics' Ins. Co.*, 49 Vt. 442, 457; *Kratzenstein v. Western Ass. Co.*, 116 N. Y. 54; *Bo-right v. Springfield F. & M. Ins. Co.*, 34 Minn. 352; *Olson v. St. Paul F. & M. Ins. Co.*, 35 Minn. 432; *DeGraff v. Queen Ins. Co.*, 38 Minn. 501; *Liverpool, &c. Ins. Co. v. Van Os*, 63 Miss. 431, 441; *Metropolitan L. Ins. Co. v. Drach*, 101 Pa. St. 278; *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262; *Goddard v. Ins. Co.*, 67 Tex. 69; *Grandin v. Insurance Co.*, 107 Pa. St. 26; *Cargill v. Millers', &c. Mut. Ins. Co.*, 33 Minn. 90; *Northwestern Mut. L. Ins. Co. v. Ross*, 63 Ga. 199; *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285; *Teutonia Ins. Co. v. Boylston Mut. Ins. Co.*, 20 Fed. Rep. 148 (La.), 1884. If an exception in a policy be capable of two equally reasonable interpretations, that must be adopted most favorable to the assured, for the language is the company's. *Western Ins. Co. v. Cropper*, 32 Pa. St. 351, 355; *Commonwealth Ins. Co. v. Berger*, 42 Pa. St. 285, 292.]

² *Western Ins. Co. v. Cropper*, 32 Pa. St. 351; *Wilson v. Hampden Fire Ins. Co.*, 4 R. I. 150; *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Bartlett v. Union Mut. Fire Ins. Co.*, 46 Me. 500; *Wilson v. Conway Ins. Co.*, 4 R. I. 141; *post*, § 210.

³ *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222.

if notice of additional insurance and an approval in writing by the insurers be required, an acknowledgment in writing that notice has been received, without more, will be deemed an approval.¹ So words of exception, if of doubtful import, are to be construed most strongly against the party in whose interest they are introduced.²

§ 176. **Same Subject.** — An instance of the application of the doctrine that where there is any ambiguity in a policy it must be taken most strongly against the party who prepares it, is well illustrated in a comparatively recent case. The proposal or declaration is made the basis of the contract and part of the policy, affirms that its particular statements are "correct and true throughout," and stipulates that if it shall hereafter appear that any fraudulent concealment or designedly untrue statement is made, the policy shall be void. It was contended by the insurers that by this language the policy was to be void not only upon an untrue statement designedly made, but also upon an untrue statement honestly made. But the court replied, that upon that construction the clause which relates to designedly untrue statements would be superfluous, because only a reiteration of that which is involved in the former clause requiring the particulars to be correct and true. But in construing an instrument prepared by the insurers, it ought to be read most strongly against the makers, and inasmuch as, upon the construction contended for, the latter clause would be wholly unnecessary, it should rather be construed as merely explanatory of what is meant by the terms "correct" and "true" in the former clause.³ Upon the same grounds courts will not make forfeiture a penalty where the contract has not so distinctly provided.⁴

¹ *Potter v. Ontario & Liv. Mut. Ins. Co.*, 5 Hill (N. Y.), 147; *Robertson v. French*, 4 East, 135; *post*, § 371; *Washington Life Ins. Co. v. Schaible* (Pa.), 1 Weekly Notes Cas. 369.

² *Palmer v. Warren Ins. Co.*, 1 Story, C. Ct. 360; *Blackett v. Royal Ex. Ins. Co.*, 2 Crompt. & Jer. 244.

³ *Fowkes v. Manchester & London Life Ass. Association*, 3 Best & Smith, Q. B. 917; s. c. E. C. L. 113, 917. See also *post*, § 193.

⁴ *Mut. Fire Ins. Co. v. Coatesville*, 80 Pa. St. 407; *National Bank v. Hartford Fire Ins. Co.*, 95 U. S. 673; *Wilkins v. Tobacco Ins. Co.*, 30 Ohio St. 317;

§ 177. **Written over Printed Words prevail.** — As in all contracts consisting partly of printed matter and partly of written, so with contracts of insurance, where any discrepancy or repugnancy exists, the written portion is to prevail over the printed,¹ for the obvious reason that as the latter contains the more general and formal provisions applicable for the most part to all cases, there is more ground for supposing that these have not been erased or modified so as to conform to the written portion, through inadvertence, than that the special and peculiar provisions of the written portion have been adopted without due consideration, and inserted without the design or contrary to the intention of the parties.²(a) The printed forms are calculated for ordinary

Behler v. German, &c. Ins. Co. (Ind.), 9 Ins. L. J. 778. But see *Hill v. Equitable, &c. Ins. Co. (N. H.)*, 6 id. 314.

¹ [*Grandin v. Ins. Co.*, 107 Pa. St. 26; *Plinsky v. Germania F. & M. Ins. Co.*, 32 Fed. Rep. 47 (Mich.), 1887; *Liverpool, &c. Ins. Co. v. Van Os*, 63 Miss. 431, 441; *Georgia Home Ins. Co. v. Jacobs*, 56 Tex. 366. Written words control the printed formula of a policy wherever there is a discrepancy; *Bargett v. Orient Mut. Ins. Co.*, 3 Bos. (N. Y.) 385, 396; *Coster v. Phoenix Ins. Co.*, 2 Wash. U. S. 51, 53; *Schroeder v. Stock & Mutnal Ins. Co.*, 46 Mo. 174, 176; without reference to their respective priority of place. *Leeds v. Mechanics' Ins. Co.*, 8 N. Y. 351, 356; *Hernandes v. Sun Mutual Ins. Co.*, 6 Blatch. 317, 325. In one case it was held that where the printed form provides that its general terms shall be controlled by indorsements of special risks, the print is incomplete and ineffective until made definite and certain by the indorsement, which in each case fixes the amount and nature of the risk, and if the print insures against loss of goods "laden on vessels, railroad, or carriage," and the writing omits "carriage," the loss of goods while in a carriage is not covered. *Kratzenstein v. Western Ass. Co.*, 53 N. Y. Super. 505. But on appeal the decision was reversed, the court saying that as there was no conflict between the print and the writing every word must have its effect. *Kratzenstein v. Western Ass. Co.*, 116 N. Y. 54; reversing 21 Jones & Spen. 505.]

² *Robertson v. French*, 4 East, 135.

(a) See *West Branch Lumberman's Exchange v. American Central Ins. Co.*, 183 Penn. St. 366; *Faust v. American F. Ins. Co.*, 91 Wis. 158; *Parker v. China Mut. Ins. Co.*, 164 Mass. 237; *Maril v. Conn. F. Ins. Co.*, 95 Ga. 604; *Crew-Levick Co. v. British & Foreign M. Ins. Co.*, 77 Fed. Rep. 858; *Palatine Ins. Co. v. Ewing*, 92 id. 111, 114; *Hagan v. Scottish Union & Nat'l Ins. Co.*, 98 id. 129; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54; *Russell v. Manufacturers' & Builders' F. Ins. Co.*, 50 Minn. 409; *Vandervolgen v. Manchester F. Ass. Co. (Mich.)*, 82 N. W. 46. In Massachusetts the act of 1894, ch. 522, § 60, cl. 7, authorized slips or riders to be attached to policies modifying the provisions in the body of the policy. See *Hardy v. Lancashire Ins.*

risks, and contain the provisions and conditions usually attached to insurances upon them. They must, therefore, necessarily be general and comprehensive in their terms, and not suited to insurances upon other and special hazards. It is the ordinary course that upon each application a special agreement is made between the applicant and underwriter, designating and describing the premises required to be insured, and fixing the terms of that particular insurance; and the policy is then completed by filling up the blank spaces left in the printed form with suitable words and clauses to express the contract thus agreed upon. This is the usual mode of consummating the contract, and not unfrequently the printed form of the policy is left unaltered, without expunging or modifying the parts of it which conflict with the written clauses. These written clauses, nevertheless, contain the elements of the contract, and being framed under the immediate eye of the parties, and with special reference to the exigencies of the particular contract, and to the terms agreed upon, they sometimes present a contract to which some of the printed parts of the policy are inapplicable. And as effect must be given to the acknowledged intentions of the parties, these written clauses must

Co., 166 Mass. 210. In States like Massachusetts, which have a standard form of policy prescribed by statute, the insurer's agents, and even its general agents, cannot vary this standard form without clear authority, and then only by inserting provisions or attaching slips in the manner prescribed by the statute. *Parker v. Rochester German Ins. Co.*, 162 Mass. 479, 481; *Hill v. Commercial Union Ass. Co.*, 164 Mass. 406; *Straker v. Phenix Ins. Co.*, 101 Wis. 413; *supra*, p. 233, note (a).

The body of the policy is the real contract between the parties; but certain material stipulations, such as the "iron-safe clause," when printed or written upon a slip attached to the policy, are treated as constituting part of the policy, though not in its body. *Crigler v. Standard F. Ins. Co.*, 49 Mo.

App. 11; see *Jackson v. British America Ass. Co.* (Mich.), 30 L. R. A. 636, and note; *Jones v. New York L. Ins. Co.*, 168 Mass. 245. If the main body of the policy contains no agreement on a particular subject, a rider, which is a small slip of paper pasted on the face of the policy, when it has no logical connection with, or relation to the warranties expressed in the policy, such as one providing for a watchman when a mill is idle, is merely a representation, the violation of which does not work a forfeiture when the loss is not due to such violation. *Hart v. Niagara F. Ins. Co.*, 9 Wash. 620. So a standard guaranty to maintain eighty per cent insurance, when stamped on the face of the policy, does not supersede the provision against further insurance in a fire policy. *Cutler v. Royal Ins. Co.*, 70 Conn. 566, 572.

necessarily supersede and control such of the printed clauses as would, if enforced and literally applied, be inconsistent with them.¹

§ 178. **Insurers confined to the Exact Words of the Warranty.** — The strictness with which courts will hold insurers seeking to set up a warranty, a breach of which works a forfeiture, is well illustrated by the following cases: The application and conditions annexed were referred to and made part of the policy. The insurance was upon a "stock of merchandise." In the application, to the question, "For what purpose is the building used?" it was answered, "Wholesale and retail hardware;" and to the question, "How many tenants?" the answer was "One." In fact, the second story of the building was occupied as a clothing-store, and the upper story for lodging-rooms. The insured covenants that the representation given in the application is a warranty, and contains a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, and value of the property insured, and if facts or circumstances shall not be fairly represented, then the policy is to be void. In the policy, also, insurance is said to be on the property described in the application, which is referred to and made part of the policy, and declared to be a warranty. It was held that while the policy would be void if the representations relating to the property insured were untrue, yet that false representations as to matters outside and independent of the property insured, and which had not in any degree contributed to the loss, would not avoid the policy; and as the stipulations both in the application and in the policy have reference to the property insured, and in respect to this there was no untruthfulness, a false representation as to the occupancy of the building which was not insured did not avoid the policy.² In another case, the insurance was upon a "stock of goods and merchandise," with a stipulation that if the "premises" be

¹ *Delonguemare v. Tradesmen's Ins. Co.*, 2 Hall (N. Y.), 589, 622; *Colt v. Phoenix Ins. Co.*, 54 N. Y. 595.

² *Howard Fire & Mar. Ins. Co. v. Cornick*, 24 Ill. 455.

“appropriated, applied, or used for the purpose of storing or keeping therein,” amongst other things, “oil and cotton,” the policy should be of no effect during such use. A barrel of oil, with bunches of cotton near it, had been kept in the back part of the store for a short time previous to the fire. But it was held that the clause by its terms was confined to the case of a building insured, — a case not covered by the policy; and if the case had been covered by the policy it should have been construed to forbid the appropriation or chief use of the building for any of the prohibited purposes, and not the incidental keeping of small quantities of prohibited articles for retail, along with a general stock of goods.¹ So an alteration in the status of the property insured, the same not being a building, as for instance the machinery in a building, is not an alteration in the “premises” insured such as will work a forfeiture.² And to prevent a forfeiture by such a breach of warranty, a bare, literal, and technical compliance on the part of the insured with the terms of the contract will sometimes be held to be sufficient, — a compliance which is nearly tantamount to an evasion. Thus, under a warranty that mills are worked by day only, keeping up the fires and running the engine by night, the machinery not being attached, would constitute no breach.³ [A mere cold does not render false the warranty that the insured had not “been sick or afflicted with disease.”⁴ When the policy described the business carried on in the insured premises, as the manufacture of bath tubs, it was held that it was no breach of the warranty that a tube brought to the premises shavings from another building used for other purposes.⁵ But a condition precedent to a policy on a ship, providing that she must sail on a certain day, &c., and “be ready for sea,” is not complied with when only the master, mate, one seaman, and two boys were on board,

¹ *Leggett v. Aetna Ins. Co.*, 10 Rich. Law (S. C.), 202.

² *Robinson v. Mercer County Mut. Ins. Co.*, 3 Dutch. (N. J.) 134, 135.

³ *Mayall v. Mitford*, 6 Ad. & El. 670; *Hide v. Bruce*, 3 Doug. 213; 1 Bennet F. Ins. Cases, 107; *Peoria Mar. & Fire Ins. Co. v. Lewis*, 18 Ill. 553.

⁴ [*Metropolitan L. Ins. Co. v. McTague*, 49 N. J. 587.]

⁵ [*Keeney v. Home Ins. Co.*, 71 N. Y. 397, 405.]

and when she had to have assistance to get down the harbor. And hence the policy did not take effect.^{1]}

§ 179. *Custom and Usage as Aids to Interpretation.* — We have just seen² that usage is not unfrequently, especially in marine insurance, resorted to in aid of interpretation. But having due regard to the incidental differences in the various kinds of risks, the rules under which evidence of custom and usage is admissible in aid of the interpretation of marine insurances are equally applicable to all the other kinds of insurances, and have been so well stated by a learned author³ that we take pleasure in transferring them to these pages. They are as follows:—

“1. Every usage of a particular trade, which is so well settled or so generally known that all persons engaged in that trade may be fairly considered as contracting with reference to it, is considered to form part of every policy, designed to protect risks in such trade, unless the express terms of the policy decisively repel the inference.

“2. The usage, moreover, in order to be binding, must be either a general usage of the whole mercantile world, or a particular usage of universal notoriety in the trade upon which, and of the place at which, the insurance is effected; the usage of a particular place, or of a particular class of persons, cannot be binding on non-residents, or on other persons, unless they are shown to have been cognizant of it.

“3. Where the sense of the words and expressions used in a policy is either ambiguous or obscure on the face of the instrument, or is made so by proof of extrinsic circumstances, parol evidence is admissible to explain by usage their meaning in the given case.

“4. A resort to parol evidence, however, is only permitted where the language of the policy is either obscure or equivocal; such evidence will never be admitted to set aside or control its plain and unambiguous terms.”

Thus, proof is admissible that camphene is customarily

¹ [Graham v. Barros, 5 B. & Adolph. 1011, 1018.]

² *Ante*, § 173.

³ Arnould on Insurance, 65 *et seq.*

used in printing establishments to clean type;¹ or that benzole is so used in patent-leather factories, and is handled in a particular way;² or that amongst manufacturers "room" means "loft," whether the loft be partitioned into distinct apartments or not;³ [or that the word "roots" means only perishable roots, and that sarsaparilla is not included;⁴] or that a house built in a certain manner is by usage treated as a house "filled in with brick;"⁵ and what is the accepted meaning of "store fixture" amongst insurance companies;⁶ and, generally, of the meaning of any particular term which has in any trade secured a limited or special meaning, different from its popular acceptance, when the term is used in a contract with a person engaged in that trade.⁷

[§ 179 A. **Usages Lawful and Known explain a Contract that does not exclude them.** — Insurers are presumed to be familiar with the usages and incidents of a risk, and contracts of insurance are always construed with reference thereto.⁸ When it appears that the parties contracted with reference to a custom of the city where they did business, the general law yields to the usage. Where a policy is underwritten upon a foreign vessel the insurer is presumed to know the common usages of trade in such country.⁹ Usage is admissible to explain what is doubtful in written contracts,¹⁰ but not to contradict what is clear; although even plain words many times acquire a special meaning through reference to well-established usage. Deviation from a policy if according to usage, does not *per se* prevent recovery.¹¹ When a policy is made upon a particular voyage, the established usages relat-

¹ *Harper v. City Ins. Co.*, 1 Bosw. (N. Y. Superior Ct.) 520.

² *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. St. 485.

³ *Daniels v. Hudson River Fire Ins. Co.*, 12 Cushing (Mass.), 416.

⁴ [*Coit v. Com. Ins. Co.*, 7 Johns. 385, 390.]

⁵ *Fowler v. Aetna Fire Ins. Co.*, 7 Wend. (N. Y.) 270.

⁶ *Whitmarsh v. Conway Fire Ins. Co.*, 16 Gray (Mass.), 359.

⁷ *Wall v. Howard Ins. Co.*, 14 Barb. (N. Y.) 383.

⁸ [*Fulton Ins. Co. v. Milner*, 23 Ala. 420, 427; *Hancox v. Fishing Ins. Co.*, 3 Sum. (U. S.) 132, 137.]

⁹ [*Hazard v. N. E. Mar. Ins. Co.*, 8 Pet. 557, 580. See also *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 160.]

¹⁰ [*Macy v. Whaling Ins. Co.*, 9 Met. (Mass.) 354, 363.]

¹¹ [*Bond v. Gonsales*, 2 Salk. 445.]

ing to such voyage are impliedly a part of the contract, even though not expressly made so.¹ Usage of an insurance company may make valid a contract made by the president, in deviation from the risk assumed in the policy, by waiver thereof, for a compensation agreed between the president and the assured, the waiver and assent being written, with its terms, across the policy without any new signature, and being recorded by the secretary.² A regular usage for twenty years, not explained or contradicted, is an immemorial record.^{3]}

[§ 179 B. **Usage counter to Settled Principle of Law and Justice not sustained.** — The usage of no class of citizens can be sustained in opposition to principles of law.⁴ A usage at a particular place without reference to the proceeds of old materials not used in the repairs, is contrary to the well settled rules of law, and to the principle of indemnity, and is therefore void.^{5]}

[§ 179 C. **Knowledge.** — The person against whom the usage is invoked must be shown to have known of it, or to have adopted it by the nature of his dealings, or to have constructive knowledge by the generality and established character of it. A usage of one insurance house, not generally known nor shown to be known to plaintiff, who was not in the habit of taking out policies where the usage prevailed, does not bind him.⁶ When a policy prohibited the carrying of more than a certain weight of coal, and the assured carried more than that weight of a "patent fuel," claimed to be materially different from coal, loaded at Cardiff (a foreign port), a local usage known only at that place, in support of his position, is not sufficient. It must be shown to have been known to both the parties at the contract's inception,⁷ or so generally known that they must be presumed to have

¹ [Bulkley v. Protection Ins. Co., 2 Paine (U. S.), 82, 91.]

² [Warren v. Ocean Ins. Co., 16 Me. 439, 450.]

³ [King v. Joliffe, 2 B. & C. 54, 59.]

⁴ [Homer v. Dorr, 10 Mass. 26, 28.]

⁵ [Eager v. Atlas Ins. Co., 14 Pick. 141, 144.]

⁶ [Gabay v. Lloyd, 3 B. & C. 793, 797.]

⁷ [Howard v. Great Western Ins. Co., 109 Mass. 384, 389.]

contracted in reference to it. The phrase "standing detached" is not ambiguous or open to evidence of usage that among insurance men the words mean a space of at least twenty-five feet.¹ Unless the assured knew or had notice of the sense in which it was employed.^{2]}

[§ 179 D. **Usage cannot change a Contract whose terms are Clearly Inconsistent with it.** — When words have no uncertain meaning, parol evidence of a commercial understanding of them is inadmissible.³ The clear provisions of a contract cannot be defeated by proof of the existence of a custom differing therefrom.⁴ The force and legal effect of an unambiguous and unequivocal agreement between two insurance companies cannot be changed by proof that by custom and usage its performance is not required.⁵ The true office of a usage or custom is to interpret the *otherwise indeterminate* intentions of the parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions and acts of a doubtful or equivocal character.⁶ The particular usage or by-law of an insurance company to pay only in proportion to what is paid on the same goods by another company cannot control a policy, and is no defence to a suit for the whole amount insured.^{7]}

[§ 179 E. **The Test.** — The question is, "Did the parties contract in reference to the usage, or do certainty and facility in business matters require that they should be presumed to have contemplated it, where they have not clearly expressed the contrary?" In order that a party may be bound by a usage it must be shown that he had knowledge of it. Usage is engrafted upon a contract or invoked to give it a meaning, on the assumption that the parties contracted in

¹ [Hill v. Hibernia Ins. Co., 10 Hun, 26, 29.]

² [Id.]

³ [Bargett v. Orient Ins. Co., 3 Bos. 385, 396; Rankin v. Amer. Ins. Co., 1 Hall (N. Y.), 619, 632.]

⁴ [Duncan v. Green, 43 Iowa, 679, 680; Marks v. Cass Co. Mill, &c. Co., id. 146, 148.]

⁵ [St. Nicholas Ins. Co. v. Mercantile Ins. Co., 5 Bos. 238, 246.]

⁶ [The Schooner Reeside, 2 Sumn. (U. S.) 567, 569.]

⁷ [Lattomus v. Farmers' Mut. F. Ins. Co., 3 Houst. (Del.) 254, 255.]

reference to it. If there is a general usage, applicable to a particular profession, parties employing an individual are supposed to deal with him according to that usage. A contract made with a man about the business of his craft, is framed on the basis of its usages except when their place is occupied by other stipulations. Where one employs another to do an act that involves the conforming to some usage, as that of the locality where the act is to be done, the principal is bound by such usage. If a custom is ancient, very general, and well known, it will often be a presumption of law that the party had knowledge of it. As a rule, a local usage must be brought home to the person before he can be bound by it. It must be shown that he had actual knowledge of it, or there must be evidence raising a strong presumption that he had notice. The question in case usage is introduced is, whether it is of such age and character that it will be conclusively presumed that the parties knew of it, as in the case of usages that have become part of the common law; or whether it is so local and particular that knowledge must be shown. It is always competent for the party to disclaim knowledge, for the jury may find that the presumption is not one of law but only one of fact, as in the case of evidence showing a local usage in the city of which the party is an inhabitant, and such presumption of fact may be negatived by evidence that the party did not in fact know of the usage.¹ The whole substance of the law of usage is a common-sense determination of the question whether under all the circumstances it is *fair* to consider the contract affected by the usage in dispute.]

§ 180. To the above may be added another rule, to wit, that proof, whether of a local or general usage, cannot be resorted to for the purpose of importing into the contract a new and distinct condition. Thus a usage that, in case of the occurrence of any circumstance by the act of the insured after effecting the insurance, whereby the risk is increased, he shall give notice thereof to the insurer, that the latter may then elect to continue or annul the policy, cannot be

¹ [Walls v. Bailey, 49 N. Y. 464.]

received in evidence, there being no stipulation in the policy requiring such notice.¹ Nor when the contract is to pay all loss or damage by fire, is it permissible to show that reinsurers are accustomed to pay only such proportion of the loss as is shown by the relation which the amount reinsured bears to the whole amount insured.² Nor where the stipulation is to keep a watch nights, can a usage be shown to except certain nights.³ But the custom of other similar establishments may be shown to explain what is "keeping a watch."⁴ And in a case where a building was torn to pieces by lightning but not burned, and the company was liable for losses "by fire by lightning," evidence of the general practice in other insurance companies in similar cases, not to pay where there is no burning, was held admissible, in aid of the interpretation of the phrase.⁵ So the custom of commission merchants to insure goods consigned to them, without instructions, in their own names, and as for their own account.⁶ But a custom is not provable to contradict the express terms of a contract, — for instance, as to payment of premium.⁷

§ 180 a. In several States the legislatures have interposed by statute to protect the insured against a loss of the benefit of his insurance by reason of immaterial misrepresentations. Thus, it was provided in Missouri, by the act of March 23, 1874, that "no misrepresentation . . . shall be deemed material or avoid the policy, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due or payable;" and it was held that a policy issued within the State, in

¹ *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y.), 632.

² *Home v. Mut. Safety Ins. Co.*, 1 Sandf. (N. Y. Superior Ct. 137; s. c. affirmed, 2 Comst. (N. Y.) 235.

³ *Ripley v. Aetna Fire Ins. Co.*, 30 N. Y. 136.

⁴ *Crocker v. People's Mut. Ins. Co.*, 8 Cush. (Mass.) 79.

⁵ *Babcock v. Montgomery County Mut. Ins. Co.*, 6 Barb. (N. Y.) 637; s. c. affirmed, 4 Comst. (N. Y.) 326. And see *post*, § 552.

⁶ *DeForest v. Fulton Fire Insurance Company*, 1 Hall (New York Superior Court). 84.

⁷ *Illinois, &c. Soc. v. Baldwin*, 56 Ill. 479; *Candee v. Citizens' Ins. Co.*, C. Ct. (Conn.), 4 Fed. Rep. 143.

which "answers, statements, representations, and declarations," made in good faith and contained in the application which was made a part of the policy, were "warranted" to be true in all respects, was within the provisions of the statute.¹ The Georgia code is construed in the same way.²

Under the Massachusetts statute,³ a condition in the policy that misrepresentations in the application shall avoid the policy is good, notwithstanding the law provides that the application shall not be a warranty or part of the contract, except so far as it is incorporated in full in the policy.⁴

In Ontario, an insurer cannot avail himself of certain statutory conditions, or of the conditions of the contract, unless the statutory conditions are printed upon the policy, but the plaintiff may avail himself of any of the statutory conditions.⁵

This statute makes certain conditions essential to any policy, provides that other conditions shall be printed conspicuously both in type and ink, and that they shall be reasonable. It seems that a condition that a policy shall be void if the title to the property insured shall be disputed in any proceeding at law or in equity is unreasonable;⁶ and under

¹ *White v. Conn. Mut. Life Ins. Co.*, C. Ct. (W. D. Mo.), 7 Ins. L. J. 394, denying the soundness of the opposite conclusion arrived at in *Farmers' Ins. Co. v. Curry*, 13 Bush (Ky.), 312, where it was held that a similar statute of that State did not apply where parties warranted, but only where they were silent upon the subject, and following *Chamberlain v. Insurance Co.*, 55 N. H. 249, and *Emery v. Piscataqua, &c. Ins. Co.*, 52 Me. 322, upon similar statutes in the respective States. *Chamberlain's* case was itself overruled in *Sleeper v. Insurance Co.*, 56 N. H. 401, so far as it held the statute to apply to neglects, mistakes, and misrepresentations in the performance of the conditions of the policy. It is still law, however, so far as it held that the statute applies to such mistakes, neglects, and misrepresentations as occur in the making of the contract. See also *Hill v. Equitable Mut. Fire Ins. Co.* (N. H.), 6 Ins. L. J. 314; *Leach v. Republic Fire Ins. Co.*, 58 N. H. 245. See also *ante*, § 143, *n*.

² *Southern Life Ins. Co. v. Wilkinson*, 53 Ga. 536; s. c. 5 Big. Life & Acc. Ins. Cas. 85; *Mobile, &c. Ins. Co. v. Coleman*, 58 Ga. 251.

³ *Ante*, § 163.

⁴ *Barre Boot Co. v. Milford Mut. Fire Ins. Co.*, 7 Allen (Mass.), 42.

⁵ *Parsons v. Queen Ins. Co.* (Can. Sup. Ct.), 16 Can. L. J. 244, 1880; s. c. 4 Can. Sup. Ct. Rep. 213. The statute applies to foreign companies licensed, but not to mutual companies. *Wellington Mut. Ins. Co. v. Frey*, 3 Leg. News, 327; R. S. Ont. c. 162.

⁶ *May v. Standard Ins. Co.* (U. C. C. P.), 15 Can. L. J. N. s. 211.

the condition requiring certificate of loss of magistrate most contiguous to the fire,¹ avoiding policy if title to property shall be disputed in any proceeding at law or in equity,² and making any misrepresentation a cause of forfeiture, have been held unreasonable.³ But conditions in the charter of a foreign insurance company are not binding upon the assured, unless brought to his notice.⁴

¹ *Shannon v. Hastings Mut. Ins. Co.*, 2 Ont. App. Rep. 81.

² *Sands v. Standard Ins. Co. (U. C.)*, 27 Grant's Ch. 167.

³ *Butler v. Standard Fire Ins. Co.*, 4 Ont. App. Rep. 391. See also *Ballagh v. Royal Mut. Fire Ins. Co.*, 5 Ont. App. Rep. 87.

⁴ *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660.

The following graphic and masterly statement of the situation out of which grew the necessity of legislative interposition, is from the pen of Mr. Chief Justice Doe, of New Hampshire. The learned Chief Justice seems to have said, in a very striking and effective way, what many other judges must have often thought.

"The nature of the mischief intended to be remedied by the act of 1855 has a bearing upon the question whether, by fair and reasonable construction, it appears that the legislature, having in 1855 forbidden all insurance companies to commit such mischief, did actually intend, in 1862, to confer on this company the exceptional legal right to commit the same mischief. The object of the act of 1855 obviously was, to remedy an evil with which the people of this State had long believed themselves to be grievously afflicted. Whether their belief had an ample or substantial foundation, or any foundation at all; whether it was justified by the conduct of a considerable number of insurance companies; or whether the course of a very few brought an undeserved reproach upon the whole system of insurance, — it is not now necessary to inquire. It is the state of things believed to exist, and not its real existence, that explains the legislation. The public belief, manifested in the annals of litigation and elsewhere, is too notorious and historic to require any specific attestation. The state of things believed to exist was this: —

"Some companies, chartered by the legislature as insurance companies, were organized for the purpose of providing one or two of their officers, at headquarters, with lucrative employment, — large compensation for light work, — not for the purpose of insuring property; for the payment of expenses, not of losses. Whether a so-called insurance company was originally started for the purpose of insuring an easily earned income to one or two individuals, or whether it came to that end after a time, the ultimate evil was the same. Names of men of high standing were necessary to represent directors. The directorship, like the rest of the institution and its operations, except the collection of premiums and the division of the same among the collectors, was nominal. Men of eminent respectability were induced to lend their names for the official benefit of a concern of which they knew and were expected to know nothing, but which was represented to them as highly advantageous to the public. There was no stock, no investment of capital, no individual liability, no official responsibility, — nothing but a formal organization for the collection of premiums, and their appropriation as compensation for the services of its operators.

"The principle act of precaution was, to guard the company against liability for losses. Forms of applications and policies (like those used in this case), of

a most complicated and elaborate structure, were prepared, and filled with covenants, exceptions, stipulations, provisos, rules, regulations, and conditions, rendering the policy void in a great number of contingencies. These provisions were of such bulk and character that they would not be understood by men in general, even if subjected to a careful and laborious study; by men in general, they were sure not to be studied at all. The study of them was rendered particularly unattractive, by a profuse intermixture of discourses on subjects in which a premium payer would have no interest. The compound, if read by him, would, unless he were an extraordinary man, be an inexplicable riddle, a mere flood of darkness and confusion. Some of the most material stipulations were concealed in a mass of rubbish, on the back side of the policy and the following page, where few would expect to find anything more than a dull appendix, and where scarcely any one would think of looking for information so important as that the company claimed a special exemption from the operation of the general law of the land relating to the only business in which the company professed to be engaged. As if it were feared that, notwithstanding these discouraging circumstances, some extremely eccentric person might attempt to examine and understand the meaning of the involved and intricate net in which he was to be entangled, it was printed in such small type, and in lines so long and so crowded, that the perusal of it was made physically difficult, painful, and injurious. Seldom has the art of typography been so successfully diverted from the diffusion of knowledge to the suppression of it. There was ground for the premium payer to argue that the print alone was evidence, competent to be submitted to a jury, of a fraudulent plot. It was not a little remarkable that a method of doing business not designed to impose upon, mislead, and deceive him by hiding the truth, practically concealing and misrepresenting the facts, and depriving him of all knowledge of what he was concerned to know, should happen to be so admirably adapted to that purpose. As a contrivance for keeping out of sight the dangers created by the agents of the nominal corporation, the system displayed a degree of cultivated ingenuity, which, if it had been exercised in any useful calling, would have merited the strongest commendation.

“Travelling agents were necessary to apprise people of their opportunities, and induce them to act as policy-holders and premium payers, under the name of ‘the insured.’ Such emissaries were sent out. ‘The soliciting agents of insurance companies swarm through the country, plying the inexperienced and unwary, who are ignorant of the principles of insurance law, and unlearned in the distinctions that are drawn between legal and equitable estates.’ *Combs v. Hannibal Savings & Ins. Co.*, 43 Mo. 148, 162; 6 *Western Insurance Review*, 467, 529. The agents made personal and ardent application to people to accept policies, and prevailed upon large numbers to sign papers (represented to be mere matters of form) falsifying an important fact by declaring that they made application for policies, reversing the first material step in the negotiation. An insurance company, by its agent, making assiduous application to an individual to make application to the company for a policy, was a sample of the crookedness characteristic of the whole business.

“When a premium payer met with a loss, and called for the payment promised in the policy which he had accepted upon the most zealous solicitation, he was surprised to find that the voluminous, unread, and unexplained papers had been so printed at headquarters, and so filled out by the agents of the company, as to show that he had applied for the policy. This, however, was the least of his surprises. He was informed that he had not only obtained the policy on his

own application, but had obtained it by a series of representations (of which he had not the slightest conception), and had solemnly bound himself by a general assortment of covenants and warranties (of which he was unconscious), the number of which was equalled only by their variety, and the variety of which was equalled only by their supposed capacity to defeat every claim that could be made upon the company for the performance or its part of the contract. He was further informed that he had succeeded in his application by the falsehood and fraud of his representations, — the omission and misstatement of facts which he had expressly covenanted truthfully to disclose. Knowing well that the application was made to him, and that he had been cajoled by the skilful arts of an importunate agent into the acceptance of the policy and the signing of some paper or other, with as little understanding of their effect as if they had been printed in an unknown and untranslated tongue, he might well be astonished at the inverted application, and the strange multitude of fatal representations and ruinous covenants. But when he had time to realize his situation, — had heard the evidence of his having beset the invisible company, and obtained the policy by just such means as those by which he knew he had been induced to accept it, and listened to the proof of his obtaining it by treachery and guilt, in pursuance of a premeditated scheme of fraud, with intent to swindle the company in regard to a lien for assessments, or some other matter of theoretical materiality, — he was measurably prepared for the next regular charge of having burned his own property.

“With increased experience came a constant expansion of precautionary measures on the part of the companies. When the court held (*Marshall v. C. M. F. I. Co.*, 27 N. H. 157; *Campbell v. M. & F. M. F. I. Co.*, 37 id. 35; *Clark v. U. M. F. I. Co.*, 40 id. 333) that the agent's knowledge of facts not stated in the application was the company's knowledge, and that an unintentional omission or misrepresentation of facts known to the company would not invalidate the policy, the companies, by their agents, issued new editions of applications and policies, containing additional stipulations to the effect that their agents were not their agents, but were the agents of the premium payers; that the latter were alone responsible for the correctness of the applications, and that the companies were not bound by any knowledge, statements, or acts of any agent, not contained in the application. As the companies' agents filled the blanks to suit themselves, and were in that matter necessarily trusted by themselves and by the premium payers, the confidence which they reposed in themselves was not likely to be abused by the insertion in the applications of any unnecessary evidence of their own knowledge of anything, or their own representations, or their dictation and management of the entire contract on both sides. Before that era, it had been understood that a corporation — an artificial being, invisible, intangible, and existing only in contemplation of law — was capable of acting only by agents. But corporations, pretending to act without agents, exhibited the novel phenomena of anomalous and nondescript as well as imaginary beings, with no visible principal or authorized representative; no attribute of personality subject to any law, or bound by any obligation; and no other evidence of a practical, legal, physical, or psychological existence than the collection of premiums and assessments. The increasing number of stipulations and covenants, secreted in the usual manner, not being understood by the premium payer until his property was burned, people were as easily beguiled into one edition as another, until at last they were made to formally contract with a phantom that carried on business to the limited extent of absorbing cash received by certain persons who were not its agents.

“When it was believed that things had come to this pass, the legislature thought it time to regulate the business in such a manner that it should have some

title to the name of insurance, and some appearance of fair dealing; and the act of 1855 was passed for that purpose.

“The loss of the time occupied by the solicitations of insurance agents, the loss of premiums and assessments paid, the loss of insurance security, the vexation and cost of lawsuits lost upon the astute and technical character of applications and policies not understood by the premium payers, the manner in which innocent and deluded persons were overwhelmed by an array of their theoretical misrepresentations and constructive frauds, and other misfortunes incident to the system, were believed to constitute a crying evil, and a mischief of great magnitude. (Whether any remedy was available at common law or in equity, upon higher grounds and broader views than were taken, — *U. M. L. Ins. Co. v. Wilkinson*, and note on that case in 11 *Am. Law Reg. N. S.* 485, — we need not, in this construction of statutes, stop to consider.) When the premium payer complained that he had been defrauded, it was not, in the opinion of the legislature, a sufficient answer to say that if he had been wise enough, taken time enough, had good eyes enough, and been reckless enough in the use of them to read the mass of fine print, and had been scholar, business man, and lawyer enough to understand its full force and effect, he would have been alarmed, and would not have been decoyed into the trap that was set for him. Men have a right to be dealt with with some regard for the state of mind and body, of knowledge and business, in which they are known actually to exist. Whether they ought to be what they are, or not, the fact is, that in the present condition of society men in general cannot read and understand these insurance documents. Whether it be reliance upon the representations of the companies’ agents, or want of taste for literary pursuits and critical exegesis, or defect of legal attainments, or press of business, or fatigue of daily labor, or dislike of insurance topography, — whatever the cause may be, the fact is, that under the ordinary circumstances of the present order of things, these documents are illegible and unintelligible to the generality of mankind. And it seemed to the legislature that the companies who sent out their agents, knowing they would be confided in by the premium payers to transact the business properly, and who issued applications and policies which they knew would not be understood, should not take an unfair advantage of mistakes into which the companies themselves, by their agents and their fine print, caused the premium payers to innocently and unconsciously fall. The action of the legislature was certainly in harmony with, if indeed it was anything more than an affirmance of, the common law (in relation to fraud, estoppel, and trust), which will not hear a man complain that he has led his neighbor into a pit. It was also thought that insurance companies, in danger of being defrauded by the premium payer’s burning his own property, were required, by their private interest and their public duty to see to it that they did not insure his property to such an amount as to lead him into temptation; and that their devices were not a prevention of, nor an appropriate protection against, the fraudulent incendiarism propagated throughout the country by excessive amounts of pretended insurance.

“As the distress of those who met with losses was not alleviated by the eminent respectability of the men whose names figured as officers of the companies, so it was the nature of a system so liable to abuse, and not the character of the nominal or real managers of the companies, that was supposed to call for the interference of the legislature. With no fault in many, and probably with substantial fault in but a few, the system came to be excessively odious. It was believed there had seldom been so flagrant an abuse of corporate power. The act of 1855 cuts up a considerable portion of the supposed evil by the roots.” *De Lancey v. Rockingham Mut. Fire Ins. Co.*, 52 *N. H.* 581. See also *post*, § 185.

CHAPTER IX.

REPRESENTATION.

ANALYSIS.

- § 181. Definition. A representation is a statement incidental to the contract, and on the faith of which it is made. A material misrepresentation made knowingly or recklessly (*i. e.*, without sufficient reason to convince a man of ordinary prudence (see § 185), and properly relied on, avoids the policy, unless there was no intentional fraud and the policy contains limiting words such as "so far as known," or "designedly untrue," &c., or the misrepresentation was induced by the fault of the company or its agent (see § 188 F).
by the Massachusetts Public Statutes 721, the misrepresentation, to be fatal, must not only be material but made with actual intent to deceive. This is not so just and wholesome a rule as that of the common law.
- § 182. Affirmative and promissory representations. The former *may* be oral (§ 192); the latter, if not in writing, will be of no effect unless made *malà fide*. If the former fails, no contract comes into existence, but the latter may fail temporarily and merely suspend the policy, or entirely destroy it (§ 194).
- § 183. Distinction between warranty and representation. The first is put into the policy and forms part of the contract, the latter is not a part of the contract but forms the basis of it, or is collateral to it.
- §§ 184-188. *Substantial* fulfilment of *material* representations is enough (§§ 184-188, see examples, § 198), but warranties whether material or not must be literally complied with (see as to meaning of substantial compliance § 198, good faith and practical equivalence, § 199; as to substantial compliance with warranty, see § 157). The test of materiality is this, — is the representation such as will naturally and probably influence the insurer in determining whether to take the risk or not, and what premium to charge? (§§ 184, 195, 196, 197.) If it had no influence or ought to have had none, it is immaterial (§ 184). The question is usually for the jury (§§ 184, 195); though sometimes for the court (§ 185); and sometimes both court and jury are excluded by a determination of the question by the parties themselves. A clear agreement that the falsity of any statement in the application shall avoid the policy, has this effect (§ 185), and making the point a subject of question and answer amounts to such agreement (§§ 185-187).

Even in such cases however, the statements do not rise to the dignity of warranties, and substantial fulfilment is still sufficient (§§ 186, 197), and nothing less than substantial compliance will do; no fulfilment of the letter and violation of the spirit will be allowed, as is sometimes the case with warranties (§ 199). Although the question of materiality is closed by question and answer, the truth of the answer is still for the jury (§ 187, 3rd paragraph), *e. g.*, did a certain disease exist so that a negative was substantially untrue (§ 187). "Watchman when will not in use" (§ 188).

In Canada an agreement which makes the policy void for incorrect statements without reference to materiality is deemed unjust and unreasonable (§ 185).

There is little sense in the distinction between warranty and representation. As to materiality there is already no difference in principle. If the parties treat a representation as material the law deems it so. In case of warranties, by their very nature the parties have always treated the statement as material. The other attempted distinction between literal and substantial fulfilment is not just, and the courts have begun to break over it. *Substantial fulfilment according to the circumstances and the nature of the case, should always be sufficient.* (See §§ 157, 161, 185, 223.) Equity looks to the substance.

- § 188 A. Examples of fatal misrepresentations; mortgage 2,000 instead of 3,000; place of goods.
 occupation at time of application must be given, not that of years before. See also § 306.
 other insurance understated.
 age.
 where policy says false answers to *written* questions will avoid it, false answers to oral questions will also, § 188 A.
 infant owner said to be widow, § 185.
- § 188 B. Disputed representations not fatal:
 if the risk is *less* on the truth than on the misrepresentation, the policy is not void.
 "beneficiary a dependent," immaterial.
 deed ownership said to be under will immaterial.
 "ship shall sail in ballast," a few goods unknown to assured, immaterial.
 representations not material nor wilful, not fatal.
 "no spirits allowed on board" excludes only their use, not freight, § 188 B.
 and see three following sections.
 if representation does not induce the contract it is not material, § 197.
- § 188 C. "When built" means year of construction, though part of materials old.
 usage that the question refers only to houses all of new stuff, inadmissible.
 wrong date immaterial if house no worse for age.

A knowingly false answer as to other applications is fatal, but "no former application" is a true answer, though an application had been made but not passed on; see § 215.

Value.

honest answer to ambiguous question sufficient.

matter of opinion, only good faith required, unless the statement of value is made part of contract.

§ 188 D. Expression of belief, expectation, or intention not fatal unless dishonest.

day a vessel is expected to sail.

Reasonable grounds for belief is enough.

The law will not presume a misrepresentation.

§ 188 E. Statement made expressly on the authority of others not fatal.

Representation may be withdrawn or qualified before policy is issued.

§ 188 F. The company's representations in a pamphlet shown to one to induce him to insure bind company.

If misrepresentations of the agent induce the misrepresentations of the assured the company is held.

§ 189. A representation though false as to only a portion of the subject it covers, generally avoids the entire contract, but a misrepresentation in *good faith* as to ownership of real estate is not fatal as to the personal property, though the premium is a *gross* sum (as it usually is in more senses than one).

§ 190. Effect of change during negotiations. Although a representation be true when made, yet if untrue when the contract is completed, the latter is void. Health changing to illness. A new policy issued by another company on the old risk, however, does not assume the continuance of the representations. In case of a renewal, *quære*.

§ 191. A change after completion of the contract is immaterial. Use and circumstances of a building need not continue the same unless expressly so agreed. An answer as to the present status is held not to promise continuance. (See also §§ 231, 247, 248.) Where however the question could have no other purpose, and good faith would not allow change, the law ought not to countenance it. Good faith is part of every agreement whether its requirements are expressed or not; see §§ 157, 244, 250-252.

§ 192. If there is a written application, prior or subsequent oral statements become immaterial. All representations are merged in the writing.

§ 193. Equivocal words, — "cotton rags;" "leased or rented."

See further, §§ 250-263.

§ 181. **Representation defined.** — A representation is a statement incidental to the contract, relative to some fact having reference thereto, and upon the faith of which the contract is entered into. If false and material to the risk, the contract is avoided. Such a false statement is termed in insurance a misrepresentation, which has been well de-

finer to be the statement of something as fact which is untrue in fact, and which the insured states knowing it to be untrue, with the intent to deceive the insurers, or which he states positively as true without knowing it to be true, and which has a tendency to mislead, — such fact, in either case, being material to the risk and adverse to the insurers.¹(a)

The general doctrine undoubtedly is, that a misrepresentation, whether made intentionally or through mistake and in good faith, avoids the policy, on the ground that, in either case, the injury to the insurer is the same. It is the fact that the insurer relies upon the truth of the representation, and not upon the intention, which misleads, whether fraudulent or otherwise, that gives him the right to complain. And the same doctrine has been frequently held with reference to concealment, but perhaps with less reason, as to which, however, we shall see more particularly hereafter.² But a simply untrue statement is not a “pal-

¹ *Daniels et al. v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Nicol v. Am. Ins. Co.*, 3 W. & M. (U. S. C. Ct.) 529.

² *Post*, ch. viii. See also *Byers v. Farmers' Ins. Co. (Ohio)*, 9 Ins. L. J. 743; *Attorney-General v. Ray*, L. R. 9 Ch. 397.

(a) Representations in relation to warranties are considered *supra* in the notes to §§ 156, 159. The powers of insurance agents are not affected by the question whether the application contains warranties or only representations. *Mutual Ben. L. Ins. Co. v. Robison*, 58 Fed. Rep. 723. A representation is not necessarily a part of the contract of insurance, or of its essence; but, as it is rather something collateral or preliminary, and in the nature of an inducement to it, it should in general, by some phraseology of the policy, be made part thereof. A false representation, unlike a false warranty, does not vitiate the contract or avoid the policy, unless it relates to a fact actually material, or clearly intended to be made material, by the agreement of the parties. *Weil v. New York L. Ins. Co. (La.)*, 24 Ins. L. J. 641; *Fowler v.*

Ætna F. Ins. Co. (N. Y.), 16 Am. Dec. 460, 463, n. When the policy does not make the application a part of the contract and contains no warranty as to the truth of statements in the application, such statements will not defeat the policy unless both material and untrue, and the question is one of fact for the jury. *Fidelity & Casualty Co. v. Alpert*, 67 Fed. Rep. 460. Where a check mark was made opposite various questions in the application, which were apparently immaterial because answered in previous questions, such mark cannot be construed as a negative answer to the question whether any prior application for insurance had been made on which no policy was issued; and when a policy is issued upon such application, imperfect or unsatisfactory answers are waived. *Manhattan L. Ins. Co. v. Willis*, 60 Fed. Rep. 236.

pably fraudulent or untrue" one;¹ and good faith is always sufficient, when the policy provides only for truth "so far as is known to the applicant,"² or against "designedly untrue" statements.³ The responsibility for misrepresentations is not, however, confined to those contained in the application, under a provision that such misrepresentations shall avoid the policy. Any other misrepresentation made at the time is equally fatal.⁴

§ 182. **Affirmative and Promissory.** — Representations, like warranties, may be affirmative or promissory. The former are those which affirm the existence of a particular state of things at the time the contract of insurance is made and becomes operative. The latter are those which are made by the assured concerning what is to happen during the term of the insurance, stated as matters of expectation, or, it may be, of contract. The one is an affirmation of a fact existing when the contract begins; the other is a promise to be performed after the contract has come into existence. And upon this distinction follows the important consequence that, while material falsity in an affirmative representation will be a complete defence to an action on a policy of insurance, the material falsity of an oral promissory representation without fraud is no defence whatever. And the reason of the distinction is this. The falsehood of the representation of a material fact misleads the insured into a contract which he does not intend to make, and therefore, in contemplation of law, because misled and deceived, does not make. He may therefore set up the fact that he was misled or deceived, as proof that no agreement was ever made, since there was no concurrence of consent upon the same facts. But an oral promissory representation, being an agreement prior in date to the actual contract of insurance, and in its nature such that it cannot be performed until after the contract of insurance has taken effect, cannot be set up to de-

¹ *Guinane v. Hope Mnt. Life, &c. Soc.*, 7 Irish Jur. o. s. 119.

² *Garcelon v. Hampden Fire Ins. Co.*, 50 Me. 580.

³ *Fowkes v. Manchester & Lan. Assur. Assoc.*, 3 B. & S. 917.

⁴ *Wainwright v. Bland*, 2 Mad. & Rob. 481; s. c. 1 Mees. & Wels. 32; *Abbott v. Howard, Hayes (Irish)*, 381.

feat the later contract; for this would be to violate a fundamental rule of evidence, and make the continuance or maintenance of a written contract dependent upon the performance or breach of an earlier oral agreement. If the oral promise be made *mala fide*, and with the intention to mislead and deceive, the fraud will have the same effect as the material falsity of an affirmative representation. But if made *bona fide* and without intention to mislead or deceive, it cannot be set up to avoid a contract.¹ Only those promissory representations are available for such a purpose which are reduced to writing and made part of the contract, — thus becoming substantially, if not formally, warranties.²

§ 183. **Distinction between Warranty and Representation.**³ — The main distinction between a warranty and a representation — that while the former is an agreement constituting a part of the contract, the latter is but a statement incidental thereto — is to be carefully observed, as it carries with it important consequences.⁴ A warranty enters into

¹ [For example, the failure of company A. to keep a \$10,000 risk on the life of C. as it promised company B. to do, in order to induce B. to reinsure the remainder of the risk then held by A. on the life of C., is no ground of defence to recovery on the policy. *Prudential Ass. Co. v. Aetna L. Ins. Co.*, 52 Conn. 576. Failure to comply with an oral promissory representation made before the policy was issued without fraud, is not a valid defence to liability on the policy. *Prudential Ass. Co. v. Aetna L. Ins. Co.*, 23 Blatch. 223.]

² *Kimball v. Aetna Ins. Co. et al.*, 9 Allen (Mass.), 540; *Kimball v. Springfield Fire & Mar. Ins. Co.*, id. This distinction has not met the approbation of some learned writers. See 1 Arnould, Ins. 498; 2 Duer, Ins. 749 *et seq.*; 1 Phil. Ins. § 533. But the opinion by Mr. Justice Gray in the cases cited will be likely to command the assent of the profession. It is a learned, clear, and satisfactory statement of the distinction referred, and the reasons upon which it rests. And see *post*, § 192.

³ [Statements will be held to be representations and not warranties if such a construction is possible. See §§ 159, 162, 164, 170–171.]

⁴ [In contracts of insurance a representation differs from a warranty and from a condition expressed in the policy in that the former is part of the preliminary proceedings which propose the contract, and the latter is a part of the contract when completed. *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, 32. The validity of the entire contract depends upon the truth or fulfilment of the warranties and conditions expressed therein, and non-compliance is a breach of the contract which makes it void; but a misrepresentation to avoid the policy must have been in a material matter or have been made with fraudulent intent. A plea may allege non-compliance with a condition and be good. But if only a representation, an allegation must be made that it was material or fraudulently made. *Deweese v. Manhattan Ins. Co.*, 34 N. J. 244, 247, 248, 251.]

and forms a part of the contract itself. It defines by way of particular stipulation, description, condition, or otherwise, the precise limits of the obligation which the insurers undertake to assume. No liability can arise except within those limits. In order to charge the insurers, therefore, every one of the terms which define their obligation must be satisfied by the facts which appear in proof. From the very nature of the case the party seeking his indemnity must bring his claim within the provisions of the instrument he is undertaking to enforce. The burden of proof is upon him to present a case in all respects conforming to the terms under which the risk was assumed. And it is sometimes said that it must not be merely a substantial conformity, but exact and literal, not only in material particulars, but in those that are immaterial as well.¹ On the other hand, a representation is, in its nature, no part of the contract. Its relation to the contract is usually described by the term "collateral." It may be proved, although existing only in parol and preceding the written instrument. Unlike other verbal negotiations, it is not merged in or waived by the subsequent writing. This principle is in some respects peculiar to insurance, and rests upon other considerations than the rule which admits proof of verbal representations to impeach written contracts on the ground of fraud. Representations to insurers, before or at the time of making the contract, are a presentation of the elements upon which to estimate the risk proposed to be assumed. They are the basis of the contract, — its foundation, on the faith of which it is entered into. If wrongly presented in any respect material to the risk, the policy that may be issued thereupon will not take effect. To enforce it would be to apply the insurance to a risk that was never presented. But where the insurer seeks to defeat a policy upon this ground, his position in court is essentially different from that which he may hold under a policy containing a like description of the risk as one of its terms. It is sufficient for the plaintiff to show fulfilment of all the conditions of recovery which are

¹ But see *ante*, § 164 *et seq.*, and *post*, § 186.

made such by the contract itself. The burden is then thrown upon the defendant to set forth and prove the untruthfulness of the representations, if there are any such, upon which he relies, and their materiality to the risk.¹

§ 184. **Materiality.** — Out of this distinction arises the question of materiality. Representations need not, like warranties, be strictly and literally complied with, but only substantially and in those particulars which are material to be disclosed to the insurers to enable them to determine whether they will enter into the contract, and upon what terms. In case of warranty the question of materiality does not arise. In case of representation it always does;² and if this materiality depends upon facts and circumstances, it is a question for the jury, to be inferred from those facts and circumstances,³ as is also the materiality of a concealment.⁴ The test of the materiality of a misrepresentation or concealment is, that it influences the insurer in determining whether to accept the risk, and what premium to charge.⁵ [A misrepresentation is material under Pub. Sts. c. 119, ss. 138–139, 181, if it increases the risk of loss, although not intended to deceive.⁶ (a)]

¹ *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Price v. Phoenix Life Ins. Co.*, 17 Minn. 497; *Miller v. Mut. Benefit Life Ins. Co.*, 31 Iowa, 216; *N. Y. Life Ins. Co. v. Graham*, 2 Duv. (Ky.) 506. [The *onus* is on the company alleging untruth of answers, to show what the application contains, and until this is done the plaintiff is not called on to prove the truth of his statements. *Roach v. Ky. Mut. Security Fund Co.*, 28 S. C. 431.]

² [In the absence of an express stipulation to the contrary, misrepresentations to avoid the policy must be material. *Mosley v. Insurance Co.*, 55 Vt. 142, 151.]

³ *Garcelon v. Hampden Fire Ins. Co.*, 50 Me. 580; *Mut. Ins. Co. v. Deale*, 18 Md. 26; *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 523; *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. (N. Y.) 481; *Daniels et al. v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416; *Franklin Ins. Co. v. Coates*, 14 Md. 285.

⁴ *Tyler v. Aetna Ins. Co.*, 12 Wend. (N. Y.) 507; *Protection Ins. Co. v. Harmer*, 22 Ohio (2 Ohio St.), 452; *Insurance Co. v. Chase*, 5 Wall. (U. S.) 509; *Tesson v. Atlantic Mut. Ins. Co.*, 40 Mo. 33; *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535; *Gates v. Madison County Mut. Ins. Co.*, 1 Seld. (N. Y.) 469; *Mut. Ins. Co. v. Deale*, 18 Md. 26.

⁵ *Ryan v. Springfield, &c. Ins. Co.*, 46 Wis. 671. [If the misrepresentation had no influence or *ought* to have had none on the risk, it is immaterial. *Clason v. Smith*, 3 Wash. 156, 157.]

⁶ [*Ring v. Phoenix Ass. Co.*, 145 Mass. 426.]

(a) See *Davis v. Aetna Mut. F. Ins. Co.*, 68 N. H. 315.

§ 185. **Question and Answer conclusive as to Materiality; Agreement as to Effect of Misrepresentation.** — But when the representations are in writing, and the parties, by the frame of the contents of the papers, either by putting representations as to the history, quality, or relations of the subject insured into the form of specific questions, or by the mode of referring to them in the policy, settle for themselves that they shall be deemed material, they are to be declared so by the court, and the insured cannot be permitted to show that a fact which both parties have treated as material is in fact immaterial. The inquiry shows that the insurer considers the fact material, and an answer by the insured affords a just inference that he assents to the insurer's view. The inquiry and answer are tantamount to an agreement that the matter inquired about is material, and its materiality is not therefore open to be tried by the jury.¹ That this materiality is under such circumstances a question for the court, has been frequently decided, especially in cases where untrue answers are given to questions as to title.² Whether certain

¹ *Wilson v. Conway Ins. Co.*, 4 R. I. 141; *Chaffee v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 376; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Miller v. Mut. Benefit Life Ins. Co.*, 31 Iowa, 216; *Le Roy v. Market Ins. Co.*, 39 N. Y. 90; *Price v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 497; *Bennett v. Anderson*, 1 Irish Jur. o. s. 245, Q. B. 245; *Blamer v. Phoenix Ins. Co.*, 45 Wis. 622; *Jeffries v. Economical Life Ins. Co.*, 22 Wall. (U. S.) 47; *Ætna Life Ins. Co. v. France*, 91 U. S. 510, 512; *Cheever v. Union Cent. Life Ins. Co. (Superior Ct. Cincinnati)*, 5 Ins. L. J. 159. In *Mutual Life Ins. Co. v. Jeffries*, in the Supreme Court of the United States, where the applicant answered that he was single when in fact he was married, the policy was held to be void, following the cases before cited in the same court in this note; 5 Ins. L. J. 533; *Trefz v. Knickerbocker Life Ins. Co. (C. Ct. N. J.)*, 6 id. 850. [A misrepresentation or concealment by one party of a fact specifically inquired about, *though not material*, will avoid the policy. *Fame Ins. Co. v. Thomas*, 10 Ill. Ap. 545, 556. The answer to a specific question, if a *fraudulent* misrepresentation will avoid the policy though not really material, for the parties by putting and answering the question have indicated that they *deemed* the matter to be material. *Schwarzbach v. Protective Union*, 25 W. Va. 622, 655. A misrepresentation must be material unless clearly agreed that it shall avoid whether material or not. *Mosley v. Vt. M. F. Ins. Co.*, 55 Vt. 142. A question and answer are equal to an agreement that the matter inquired about is material, and the question of materiality is not open to the jury. *Cuthbertson v. Insurance Co.*, 96 N. C. 480.]

² *Locke v. North American Fire Ins. Co.*, 13 Mass. 61, 68; *Strong v. Manuf. Ins. Co.*, 10 Pick. (Mass.) 40, 45; *Fletcher v. Commonwealth Ins. Co.*, 18 id.

statements are or are not material, is a matter upon which there may be a difference of opinion. Nothing therefore can be more reasonable than that parties entering into a contract of insurance shall determine for themselves what they think to be material. And that determination is conclusive.¹ So an agreement that the falsity of any statement in the application shall avoid the policy excludes from the court and jury the question of its materiality.² And it is of no consequence that the assured did not know of its falsity.³ [In Canada, however, it is held that a variation of the statutory

419, 421; *Draper v. Charter Oak Ins. Co.*, 2 Allen (Mass.), 573; *Towne v. Fitchburg Ins. Co.*, 7 id. 51, 53; *North Am. Fire Ins. Co. v. Throop*, 22 Mich. 146; *post*, § 209.

¹ *Anderson v. Fitzgerald*, 4 H. L. Cas. 484. In *Gerhauser v. North British Ins. Co.*, 6 Nev. 15, it is said that it may be doubted whether the fact that a question is put and answered is anything more than evidence tending to prove materiality, — a doubt which certainly is not without reason. It ought not to be conclusively presumed that the intention of honest and intelligent parties to a contract is to make its validity depend on the truth of an answer containing matters wholly foreign to the risk, or, it may be, wholly irrelevant to the contract. Suppose it be said that the insured house faces to the north when in fact it faces to the south, or that it is painted red when in fact it is painted white. See *Conover v. Mass. Mut. Life Ins. Co.*, 3 Dill. C. Ct. 217; *ante*, § 164 *et seq.*; *Fitch v. American Popular Life Ins. Co.*, 59 N. Y. 557, reversing s. c. 2 Sup. Ct. (N. Y.) 247; *Moulou v. American Life Ins. Co.*, 101 U. S. 708. In *Fitch v. American Popular Life Ins. Co.*, *supra*, it appeared that it was explained in the application, among other things, that the insurance could only be jeopardized by dishonesty or inexcusable carelessness, and then a series of questions was put, which, to use the language of the court, “no human being could with safety undertake to answer accurately and warrant the correctness of his answers.” In such a case, say the court, “a company cannot be permitted in the same paper to say to the assured, to induce him to enter into the contract, that nothing but fraud or intentional misstatement shall avoid the policy, or that payment will be contested only in cases of fraud, and, when the claim for payment is presented, to set up as a defence a merely technical breach of warranty in relation to some trivial matter though the answers were warranted to be true.”

² *Jeffries v. Insurance Co.*, 22 Wall. (U. S.) 48; *Etna Ins. Co. v. France*, 91 U. S. 510, 512; *Co-operative Life Ass. v. Leflore*, 53 Miss. 1. [Where the policy is to be void in case of “any misrepresentation whatever,” a statement that the owner was M. E. Jack, the widow of Capt. Jack, when really she was an infant three years old, avoids the policy. *Graham v. Fireman's Ins. Co.*, 87 N. Y. 69.]

³ *Macdonald v. Law Union, &c. Ins. Co.*, L. R. 9 Q. B. 323; s. c. 3 Ins. L. J. 797. [*Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606; *Insurance Co. v. Pyle*, 44 Ohio St. 19. In equity it is immaterial whether the party misstating a fact knew it to be false or did not have reason to believe it was true, even if misrepresented by mistake. *Harding v. Randall*, 15 Me. 332, 335.]

condition which declares a policy void for false or incorrect statements without provision as to their materiality is unjust and unreasonable;¹ and this seems to be a just and true decision.]

§ 186. **Such Representations construed less strictly than Warranties.** — Representations of this kind, however, are not strictly warranties, and differ from warranties in that a substantial compliance with them is sufficient to answer their terms.² Whether there has been such substantial compliance, that is, whether the representation is in every material respect true is a question of fact for the jury. But it is not for the jury to say that the representation, though substantially untrue, is nevertheless immaterial. For example: suppose that in answer to a specific question the insured states his age to be thirty years, when in fact he is a month older; or that a building is one hundred and ninety feet distant from another, when in fact it is but one hundred and seventy-eight feet distant;³ or that there is no building within a hundred feet of the premises insured, when in fact there is a small building adjoining used as a water-closet;⁴ or that the applicant has three brothers, when in fact he has three brothers and four half-brothers;⁵ it would be proper to submit to the jury whether the answer, though strictly and technically untrue, is not substantially and materially true. The materiality of the variance may properly be considered by the jury in passing upon the truth of the answer. Not so, however, if the answer be that one stove only is used, when in fact two were used.⁶ Nor under this guise would they have a right to pass upon the materiality of the question itself, that being conclusively settled by the act of the parties, by which both must be bound. The substantial

¹ [Reddick v. Saugeen Mut. Fire Ins. Co., 14 Ont. R. 506.]

² Horn v. Amicable Mut. Life Ins. Co., 64 Barb. (N. Y.) 81; *post*, § 204. [Higgin v. American Lloyds, 14 Fed. Rep. 143, 7th Cir. Ill. 1882; Higgin v. National Lloyds, 11 Biss. 395.]

³ O'Neil v. Ottawa Agr. Ins. Co., 15 Can. L. J. 207, 208 (U. C. C. P.), 1879.

⁴ Naughton v. Ottawa Agr. Ins. Co., 43 U. C. (Q. B.) 121.

⁵ Bridgman v. London Life Ass. Co. (U. C. Q. B.), 16 Can. L. J. 29 (1880).

⁶ O'Neil v. Ottawa Agr. Ins. Co. (U. C. C. P.), 15 Can. L. J. n. s. 207, 208.

truth of the statement — its truth in all respects material to the risk¹ — they may pass upon; with the materiality of the facts they have nothing to do.² (a) To further illustrate: Where the interrogatory was, "How long since the party was attended by a physician? For what disease or diseases?" and the answer, "Not since the year 1847, when he had the yellow fever," — it was held that the testimony of a physician that he had attended the applicant since that time for asthma did not justify the withdrawal of the case from the jury, and that the question whether he in fact had asthma, as well as whether he may not have understood the interrogatory as asking information respecting attendance for a particular disease or diseases, and their description, should have been submitted to the jury.³ So the question whether he has consulted a physician, as it naturally diverts the mind to a recent time, will not be held to be untrue, because at some more or less remote period a physician was consulted.⁴ And where the question was whether the applicant had any other insurance upon his life, and the answer

¹ Cadwalader, J., in *France v. Aetna Life Ins. Co.*, 2 Ins. L. J. 657.

² *Miller v. Mut. Benefit Life Ins. Co.*, 31 Iowa, 216; *Mut. Benefit Life Ins. Co. v. Wise*, 34 Md. 582; *Horn v. Amicable Mut. Life Ins. Co.*, 64 Barb. (N. Y.) 81. In *Equitable Life Ass. Soc. v. Paterson*, 41 Ga. 338, where the policy was to be void upon any false statement respecting person or family, and the insured stated that the woman whose life was insured was his wife, when in fact she was not, as his real wife was alive, though it did not appear that he knew it, it was held that the statement was material if the insured knew it to be false; otherwise not. But this seems to be counter to all the authorities. The materiality does not at all depend upon a knowledge of the truth or falsehood of the facts. As to effect of knowledge in concealment, see *post*, § 202.

³ *Moulor v. Am. Life Ins. Co.*, 101 U. S. 708.

⁴ *World's Mut. Life Ins. Co. v. Schultz*, 73 Ill. 586. See also *Rockford Ins. Co. v. Nelson*, 65 id. 415.

(a) See *Cobb v. Covenant Mut. Benefit Ass'n*, 153 Mass. 176; *March v. Met'n L. Ins. Co.*, 186 Penn. St. 629; *Sweeney v. Met'n L. Ins. Co.*, 19 R. I. 171; *Mutual L. Ins. Co. v. Simpson*, 88 Texas, 333. Representations in an application for a life policy are presumed to be true; and fraud, misrepresentation, or concealment, to be relied upon, must be specially set up in defence by the insurer, who has the burden of proof. *O'Connell v. Knights of Damon*, 102 Ga. 143; *Chambers v. Northwestern Mut. L. Ins. Co.*, 64 Minn. 495; *Marston v. Kennebec Mut. L. Ins. Co.*, 89 Maine, 266; *Benjamin v. Conn. Ind. Ass'n*, 44 La. Ann. 1017; *Yore v. Booth*, 110 Cal. 238.

was "yes," when there was only a proposal for insurance pending, it was left to the jury to say whether that answer was true or not true in the sense of the policy, and to find it to be true if it was more prejudicial to him and less injurious to the insurer, than if the answer had been literally true.¹

§ 187. **Substantial Truth of Answers** (*continued*). — In a leading case, where the questions were whether the applicant then or theretofore was or had been subject to, or in any way affected by, consumption, bronchitis, spitting of blood, &c., to which the answer was in the negative, the court say: "The only question for the jury on this branch of the case, therefore, was whether these representations were substantially untrue; that is to say, whether at or before the time of making the application the assured actually had either of these diseases or infirmities; and, if they found that he had, the policy was void, and the plaintiff could not recover. Applying this rule to the evidence stated in the report, it was for the jury to decide whether 'chronic bronchitis,' or 'bronchial difficulty,' or any other bodily affection or condition to which the assured was found by them to have been subject, amounted to bronchitis, consumption, disease of the lungs, or some other of the infirmities stated in the application and relied on by the defendants; and whether the spitting of blood by him, if proved to have taken place, was under such circumstances as to indicate disease in his throat, lungs, air passages, or other internal organs. But it was not within the province of the jury, under the guise of determining whether the statements of the applicant were materially false or untrue in some particulars material to the risk, to find that diseases and infirmities were not material to be disclosed, which the parties had by the form of the contract of insurance and of the contemporaneous written application con-

¹ *Inman v. Globe Mut. Life Ins. Co.*, C. Ct. (Ky.), 4 Ins. L. J. 719. In *Somers v. Athenæum Ins. Co.*, 9 L. C. S. C. Montr. 61, it was held that a representation that an attached house was unattached was immaterial, it appearing that the premium paid was for an attached house.

clusively agreed to consider material.”¹ So in *Price v. Phoenix Mutual Life Insurance Company*,² where the question was, “Has the party ever had any of the following diseases?” naming several, and among others, “rheumatism,” and the answer was, “Never.” In that case there was evidence tending to show that the life-insured had had sub-acute rheumatism. There was also evidence in the case tending to show that sub-acute rheumatism is not the *disease* of rheumatism, in the ordinary understanding of the term. There was also evidence tending to show that, technically, and in medical parlance, sub-acute rheumatism is the disease of rheumatism, and that it is generally overlooked as a disease. And the court left it to the jury to say, whether the rheumatism referred to in the question is the *disease* of rheumatism. Any rheumatic affection not amounting to the *disease* of rheumatism, they said, would not be comprehended in its terms, any more than the spitting of blood occasioned by a wound of the tongue, or the extracting of a tooth, is the *disease* of “spitting of blood,” mentioned in the same question. The life-insured had a right to answer the question upon the basis that its terms were used in their ordinary signification. If there is any ambiguity in the question, so that its language is capable of being construed in an ordinary, as well as a technical sense, the defendant can take no advantage from such ambiguity.³ And in the same case, to the question, “Has the party had, during the last seven years, any severe sickness or disease?” the answer was, “No.” The allegation in defence was, that the life-insured had had within seven years *chronic gastritis*. There was evidence tending to show that he had had gastritis; and the court said that unless chronic gastritis and gastritis are synonymous, as to which there is no judicial presumption nor testimony, the evidence was not within the issue, so that the false representation charged was not

¹ *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381 ; *Gerhauser v. North Brit. & Mar. Ins. Co.*, 6 Nev. 15 ; *Conover v. Mass. Mut. Life Ins. Co.*, 3 Dill. (C. Ct.) 217 ; *Swick v. Home Ins. Co.*, 2 id. 161 ; *post*, § 300.

² 17 Minn. 497.

³ *Wilson v. Hampden Fire Ins. Co.*, 4 R. I. 159. And see *post*, §§ 202, 210.

proved. In addition to this consideration, the court was not free from doubt as to whether gastritis was shown to be "a severe sickness or disease." "We can," it said, "take no judicial cognizance of its character. The evidence certainly has a strong tendency to show that it was the result of the excessive use of spirits, and that it was an affection of brief duration. We cannot say that the jury might not, upon the evidence, find a warrant for regarding it as a temporary consequence of dissipation, rather than a 'severe sickness or disease,' in the ordinary meaning of those terms."

So if the question be whether the party be employed in the military service, the jury may consider whether the facts proved show an actual employment, but not the materiality of the fact; or if he has had any sickness or serious injury, they may consider whether the facts proved amount to "sickness" or "serious injury," as understood by the parties, but not whether the sickness, if proved, is material; or if the application of the insured has been declined by any company, they may consider whether the facts proved amount to a declination, but not whether the declination is material. The question of materiality is closed by the interrogatory and answer; the question of the truth of the answer is for the jury; and here they have so much latitude as to be allowed to find it to be true, if it is substantially true, though not technically, literally, or exactly true. To warrant against disease is one thing; to say that there is none, on penalty of forfeiture if there is untruth, is perhaps another, the element of knowledge sometimes entering into this question of truthfulness.¹ (a)

¹ Mut. Benefit Life Ins. Co. v. Wise, 34 Md. 582, 583. See also *Wilkinson v. Conn. Mut. Life Ins. Co.*, 30 Iowa, 119; *Swift v. Mass. Mut. Life Ins. Co.*, 63 N. Y. 186; *Hutchison v. Nat. Loan Fund Life Ins. Co.*, 7 Ct. of Sess. Cases, 2d series, 467; s. c. 3 Big. Life & Acc. Ins. Cas. 444, a very instructive case. See also *ante*, § 187; *post*, § 295 *et seq.*; *World Mut. Life Ins. Co. v. Schultz*, 73 Ill. 586.

(a) Neglect of the applicant to disclose an ailment which would cause the risk to be rejected, if known, is not fraud when its real nature is wholly unknown to him. *March v. Met'n L. Ins. Co.*, 186 Penn. St. 629. But see *Baumgart v. Modern Woodmen of America*, 85 Wis. 546; *Boyle v. Northwestern Mut. Relief Ass'n*, 95 Wis. 312; *Globe Reserve Mut. L. Ins. Co. v. Duffy*,

§ 188. As another illustration of what is meant by the substantial truth of answers to questions, may be cited the recent case of *Power v. City Fire Insurance Company*,¹ where the answer was, "There is a watchman when the mill is not in use," and the court charged the jury that it was for

¹ 8 Phila. 566.

76 Md. 293; *Albert v. Mutual L. Ins. Co.*, 122 N. C. 92. When the policy is delivered by the insurer's agents who know the applicant's physical condition and state of health, or overdue premiums are repeatedly taken without requiring health certificates, there is a waiver of the health conditions. *Manhattan L. Ins. Co. v. Carder*, 82 Fed. Rep. 986. See *New York L. Ins. Co. v. Baker*, 83 id. 647; *Ætna L. Ins. Co. v. Smith*, 88 Fed. Rep. 440. In general, temporary ailments, that do not necessarily cause death, need not be mentioned by an applicant for life insurance, nor do they vitiate a reinstatement. *Penn. Mut. L. Ins. Co. v. Mechanics' Sav. B. & T. Co.*, 37 U. S. App. 692; 43 id. 75; *Fidelity Mut. L. Ass'n v. Miller*, 92 Fed. Rep. 63; *Knights of Pythias v. Cogbill*, 99 Tenn. 28; *French v. Mutual Reserve Fund L. Ass'n*, 111 N. C. 391; *Hann v. National Union*, 97 Mich. 513; *Continental L. Ins. Co. v. Yung* (113 Ind. 159), 3 Am. St. Rep. 630, and note. An applicant who is, at the time of insuring, suffering from a cold, which later leads to pneumonia, may yet be held by the jury to be "in good health," within the meaning of his representation to that effect. *Smith v. Met'n L. Ins. Co.*, 183 Penn. St. 504; *Barnes v. Fidelity M. L. Ass'n*, 191 id. 618; *Manhattan L. Ins. Co. v. Carder*, 82 Fed. Rep. 986. If an applicant who has had the gripe, and so informed the medical examiner, answers "no," on the latter's advice to a question as to serious illness, the insurer is estopped to rely upon such representation, though it is made a warranty. *Mutual L. Ins. Co. v.*

Blodgett, 8 Tex. Civ. App. 45; see *Mutual L. Ins. Co. v. Selby*, 72 Fed. Rep. 980; *Baker v. New York L. Ins. Co.*, 77 id. 550; 83 id. 647; *Meyer-Bruns v. Penn. M. L. Ins. Co.*, 189 Penn. St. 579; *Patterson v. Natural Premium M. L. Ins. Co.*, 100 Wis. 118; *Weimer v. Economic L. Ass'n (Iowa)*, 79 N. W. 123; see *Gallant v. Met'n L. Ins. Co.*, 167 Mass. 79; *Knights of Pythias v. Cogbill*, 99 Tenn. 28. An injury received in early life, the effects of which have wholly disappeared, is immaterial to the question whether a mature person was ever physically injured. *Standard Life & Acc. Ins. Co. v. Martin*, 133 Ind. 376. Where in the application the insured falsely stated he had never had piles, and the contract provided that it should be void if any of the statements in the application should prove untrue, it was held that there could be no recovery, although the insured was ignorant that he had had piles. *Baumgart v. Modern Woodmen of America*, 85 Wis. 546.

Where the agent of an accident insurance company, after frequently conversing with a man partially deaf, solicits him to take out a policy, the insured can prove these facts, by the agent on cross-examination, to rebut the presumption that the company was induced to take the risk by the representation in the application that the insured was not subject to any bodily infirmity. *Follette v. U. S. Mut. Acc. Ass'n*, 107 N. C. 240. If the evidence is conflicting upon the question whether the assured had a certain disease, the presumption is against the insurer. *Flynn v. Mass. Benefit Ass'n*, 152 Mass. 288.

them to determine if this warranty was strictly kept.¹ A statement as to future habits or practices, if a warranty at all, is not a condition precedent, since it does not relate to the commencement of the risk. It is at most a promissory warranty, which is not a condition precedent, and therefore its breach must be alleged and proved by the defendant.²

¹ The court said: "Every representation made for the purpose of obtaining an insurance must be strictly and literally true, in the sense that no other state of facts can be taken as an equivalent of it. If it be that there was a watchman, only that fact, and no other amount of equivalent care or cautious arrangements or other guards, can be accepted as satisfying the representation. The representation in the application is a written covenant that it is true, and makes the truth of the answer a condition precedent to any claim upon the insurer. I have felt some inclination to think that the answer was not intended to refer to the nightly suspensions of work in the mill, but only to seasons when the mill was not in use at all, but lying idle. This, however, has not been insisted on, and I do not consider it. I take the insurer to include the case before us, wherein the mill was run during each day and stopped at night. But I cannot say that the answer was intended by the parties as a contract that the insured should always keep a watchman at the mill when it was not going, and that his sole duty during such times should be to watch against fire, always awake, and always present; nor can I say that the law constructs such a contract out of the answer. The answer is very loose in its terms, and the insurers accept it in all its looseness, and then as of little importance, and do not insert it in the policy for the further guidance of the insured, but file it away in their office. It makes no approach to a definition of the function to be performed by the watchman. The word is in its very nature loose and indefinite in its meaning; and the law cannot supply this defect by giving a definition, because it is not a technical term of the law, and because the nature of a watchman's functions varies in different places and according to the dangers to which the property is exposed, and even according to the nature and value of the property. Watchmen are seldom mere watchmen against fire, but almost always against all dangers, of whatever kind. Some kinds of danger, and at some times, require constant wakefulness; other kinds, at other times and places, do not. Many, perhaps most persons, guard their stores, safes, mills, factories, &c. (when they watch at all), by clerks or hands who sleep on the premises, so as to be at hand when danger arises. A family sleeping in the house is a protection of it. The court cannot declare, as matter of law, what is the proper degree of a watchman's care, implied in this answer, without adding to the contract of the parties. We might as well define a house in a contract for building a house. It is for the jury to say whether or not the plaintiff has strictly and literally complied with his contract to keep a watchman when the mill is not in use." This case was affirmed on a writ of error to the Supreme Court. See also *North Am. Fire Ins. Co. v. Throop*, 22 Mich. 146, 158, and 159, for some valuable suggestions as to the strictness and precision required in such answers. As to keeping a watch, see further, *post*, § 250 *et seq.*

² *Van Valkenburgh v. Am. Popular Life Ins. Co.*, 70 N. Y. 605; *New York Life Ins. Co. v. Graham*, 2 Duv. (Ky.) 506; *Knecht v. Mut. Life Ins. Co.*, 90 Pa. St. 118; *post*, § 192. In the first of the above cases the court held the following language (Folger, J.): —

[§ 188 A. **Examples of Fatal Misrepresentations.** — Stating a mortgage at \$2,000 when it was really \$3,200 is fatal.¹

“The issue of fraud was based upon the questions and answers in the application for a policy. The questions and answers relied upon by the defendant were those regarding the habits of the intestate in the use of intoxicating drinks. They must be considered as of the date of the application, which was in the last of December, 1870, and a reasonable time before and after. He answered that his habits of life were correct and temperate in all respects ; that he was abstemious, a free and generous liver, and has always been so. It is not easy to find any definite result from these answers. They seem to neutralize each other. The idea conveyed by saying of a man that he is a free and generous liver, is contradictory of that given by saying of him that he is temperate in all respects, and abstemious. If the defendant was satisfied with these opposing answers when the application was read and the policy issued, it cannot now object.

“It is difficult to understand some of the questions and some of the answers, from the peculiar and obscure method adopted by the defendant. But it may be fairly said that the intestate answered that he did not use ale, beer, or wine. The statement of the medical examiner was more positive and particular, to the effect that the intestate was temperate and correct in his habits, and did not use any intoxicating liquors. There was testimony that about the date of this application, and before it, the intestate did drink whiskey, and once at least to the point of intoxication.

“There was also testimony on the other side of the question. It was to the effect that the witnesses knew him well, or were very intimate with him ; that his habits were good ; that they remember his drinking but very seldom, and never saw him intoxicated or under the influence of liquor ; that he was a remarkably healthy man, of fine physique ; that they had known him to refuse liquor when offered to him, and never saw anything to induce belief that he was not perfectly temperate.

“Though this testimony was, from a necessity of its character, negative, still it was pertinent to the issue, and competent to be given on a question of the habits of sobriety or the contrary. It needs must be weighed with the affirmative testimony in coming to a conclusion whether with fraudulent intent the intestate made the answers relied upon by the defendant. I do not think that most men, or at least many men, would feel that they were making a fraudulent answer if they said that their habits of life were correct and temperate, and that they did not use intoxicating liquors, if they drank them no oftener than the intestate did, according to the testimony of the witnesses for the plaintiff, especially when with that answer is the other, that they were free and generous livers, and had always been so. In common acceptation, the latter phrase indicates those who do not entirely refrain from the use of stimulating drinks.

“I am obliged to confess that I get no idea from the question, ‘Nor use alcoholics in kind ? or distilled spirits in kind ?’

“The question, ‘Use any intoxicating liquors or substances ?’ is a question which does not direct the mind to a single or incidental use, but to a customary or habitual use. Such is one of the meanings of the noun ‘use’ and the verb ‘use ;’ as ‘Use hospitality one to another without grudging.’ It was a question not indisputably and conclusively settled by the testimony as a whole, whether

¹ [Byers v. Farmers’ Ins. Co., 35 Ohio St. 606.]

When goods were described as being in a certain house, there could be no recovery when as a matter of fact the goods were in another place, when burnt.¹ The insured must, when asked his occupation, state what he is doing at the time of the application and not what he did years before. A *temporary* suspension however would probably not invalidate the answer.² A representation that existing insurance is less than it really is, is material.³ So is a representation as to age.⁴ When a policy stipulates that false answers to *written* inquiries shall avoid it, false answers to *parol* inquiries made previous to the execution of the policy and on material points, also avoid the policy.⁵

the intestate could be so clearly charged with such use as that he might plainly be charged with a fraudulent intent in answering 'no' to the medical examiner, and being so unsettled, it was proper to give the solution of it upon the evidence to the jury. We have not lost sight of the interpretation of the word given to the jury by the court at *nisi prius*. If that had been more unfavorable to the defendant than that which we adopt, we might feel that the defendant should have the benefit of a milder construction.

"There was also a conflict in the whole evidence, whether the disease of which the intestate died was aggravated by intemperance. It was proper that the jury should pass upon it. It was not for the plaintiffs to make out, as a part of their case, the negative of that proposition. It was for the defendant to establish it as an affirmative, the same as they would any breach by the subject of the insurance of any other condition subsequent of the policy. If it be conceded to be a warranty, it is not a condition precedent, for it does not relate to the commencement of the risk. It is a promissory warranty which is not a condition precedent. *New York Life Ins. Co. v. Graham*, 2 Duv. (Ky.) 506. I see no error in the portion of the charge excepted to, taken in connection with the peculiar application and contract in this case. It was held in *Fitch v. Popular Life Company*, 59 N. Y. 557, on a like application and policy, that it was necessary for the defendant to show, not only that the statements were untrue, but that they were known to be so, and were made with a fraudulent intent. Now a fraudulent intent must, to some degree at least, depend upon the understanding which the applicant has of the meaning of the question. The jury are to find that intent; that it existed in the heart of the applicant at the time he answered. Of course they must first find what was his conception of the question. If according to that conception he answered truthfully, then he did not answer with fraudulent intent. They are to find what that conception was, under the direction of the court as to the legal construction of the phrases used, if any is required, or their own understanding of the purport of the question."

¹ [*Eddy Street Iron Foundry v. Hampton Stock & Mut. Fire Ins. Co.*, 1 Cliff. (U. S.) 300, 304.]

² [*United Brethren Mut. Aid Soc. v. White*, 100 Pa. St. 12.]

³ [*Armour v. Transatlantic Fire Ins. Co.*, 47 N. Y. Super. 352.]

⁴ [*Ala. Gold Life Ins. Co. v. Garner*, 77 Ala. 210; *infra*, § 305.]

⁵ [*Wainwright v. Bland*, 1 M. & W. 33, 35.]

[§ 188 B. **Examples of Disputed Representations not Fatal.** — Where D. took out a policy on his own life payable to M. whom he declared, *in a postal to the company*, to be a creditor and one upon whom the applicant D. was dependent, and it appeared that M. was a creditor, but not one on whom D. was dependent, it was held that the postal was evidence to go to the jury on the question of fraud, but that the false statement as to dependence was entirely immaterial. D.'s dependence on M., even if existent, could not be effectual to give M. an insurable interest in D.¹ When the material fact is ownership it is immaterial that the applicant states his holding to be under a will when really it is under a deed.² A representation in time of peace that a ship shall sail in ballast is substantially complied with though she have on board a trunk of merchandise and ten barrels of gunpowder, unknown to the owner.³ Mere mistakes in stating facts which do not in themselves (the facts) annul the policy and do not appear to be wilful misrepresentations will not defeat the action.⁴ When a cargo to be put on the insured ship was misrepresented, but the same was not stated in the policy, nor did it appear to have influenced the underwriter as to risk, it was held that the jury were warranted in finding it to be immaterial.⁵ A representation that "no spirits shall be allowed on board" a ship, does not prevent her carrying a whole cargo of them for transportation. It only prohibits their use.⁶]

[§ 188 C. It is correct to answer the question "When built?" by naming the year of construction, although part of the materials had been in an older structure, and evidence that "when built" refers by usage only to buildings wholly of new materials will not be received.⁷ An answer that the house was built in 1870 whereas the true date was

¹ [Mace v. L. Ass., 101 N. C. 122, 128.]

² [Monaghan v. Agr. Fire Ins. Co., 53 Mich. 239.]

³ [Suckley v. Delafield, 2 Caines (N. Y.), 221, 223.]

⁴ [Jones v. Mechanics' Fire Ins. Co., 36 N. J. L. 29, 41.]

⁵ [Flinn v. Headlam, 9 B. & C. 693, 696.]

⁶ [Irvin v. Sea Ins. Co., 22 Wend. 380, 381.]

⁷ [Lamb v. Council Bluffs Ins. Co., 70 Iowa, 238.]

1862, is immaterial where it appears that the house is none the less valuable by reason of extra age.¹ (a) A knowingly false answer as to other applications for insurance by the same person avoids the policy.² (b) But where the question was "Has any application ever been made to this or any other company on which a policy was not issued?" was held not improperly answered in the negative where an application had been made but not passed upon as yet by the company.³ Where a party seeking to insure mill machinery, gearing, tools, &c., was asked "What is the value of the property to be insured, exclusive of land and property not specified?" and he answered "\$25,000," which was the value of the entire mill property, it was held that, the question being somewhat ambiguous, the insured might reasonably infer that the whole value of the mill was what was wanted, and especially as the company was not damaged by the answer, it would not avoid the policy.⁴ Strict accuracy is not required in statements of value which are matters of opinion, but only good faith.⁵ It must not only be shown that a representation of value was not true, but that the insured knew it was not at the time he made it.⁶ But if the statement of value is made part of the contract, the doctrine of immateriality does not apply.⁷ A representation as to the value of the property insured is always material, and

¹ [Eddy v. Hawkeye Ins. Co., 70 Iowa, 472.]

² [Edington v. Aetna Life Ins. Co., 100 N. Y. 536.]

³ [Langdon v. Union Mut. Life Ins. Co., 14 Fed. Rep. 272 Mich, 1882.]

⁴ [Mut. Mill Ins. Co. v. Gordon, 20 Brad. 564, 121 Ill. 366.]

⁵ [Dupree v. Virginia Home Ins. Co., 92 N. C. 417.]

⁶ [Lexington Ins. Co. v. Paver, 16 Ohio, 336, 337.]

⁷ [Bobbitt v. Liv., Lon., & G. Ins. Co., 66 N. C. 70, 79.]

(a) A statement in the application that the building cost \$13,000 in response to the question what proportion would remain uninsured, is not shown to be untrue by evidence that it was only worth \$6,000 at the time of insuring. *Myers v. Lebanon Mut. Ins. Co.*, 23 Ins. L. J. 308.

(b) A representation in an application for insurance that no other insur-

ance existed on the property is not to be deemed false, in such a sense as to invalidate the insurance obtained on such application, merely because a former owner of the property, after having parted with his title, effected other insurance thereon in his own favor. *State Ins. Co. v. New Hampshire Trust Co.*, 47 Neb. 62.

however honestly made, will if false avoid the policy where the application is referred to in it.¹]

[§ 188 D. No representation of a party's expectation or belief or intention will avoid a policy unless fraudulently made.² The company has no right to rely on such statements as absolute verities.³ A statement that a ship will sail on a certain day is only an expectation, and does not avoid the policy if untrue, in the absence of fraud.⁴ She had sailed six months previously unknown to the assured.⁵ An expression of opinion that a ship "is sure to be an early one — a cargo is ready for her" does not avoid the policy if untrue in fact, though the risk is thereby exchanged from a summer to a winter risk; the statement was only one of expectation.⁶ Untrue representations if made with an honest and reasonable belief of their truth, are no ground for action.⁷ The law will not presume a misrepresentation.⁸]

[§ 188 E. Where a letter contains a representation of facts not known to the party, but from the information of others, as appears in the letter, or as a necessary inference from the nature of the facts, the representation is not falsified by the mere proof that the facts are not so. If the party communicating the facts did receive such information and *bona fide* confided in it, the policy would not be avoided.⁹ A representation made on application for insurance may be withdrawn or qualified before the execution of the policy.¹⁰]

[§ 188 F. **Representations by the Company.** — A pamphlet issued by the company and shown to the plaintiff by the

¹ [Bobbitt v. Liv., Lon., &c. Ins. Co., 66 N. C. 70.]

² [Bryant v. Ocean Ins. Co., 22 Pick. 200.]

³ [Clason v. Smith, 3 Wash. C. C. 156, 157.]

⁴ [Rice v. N. E. Mar. Ins. Co., 11 Pick. 439, 443.]

⁵ [Barber v. Fletcher, 1 Doug. 305, 306.]

⁶ [Hubbard v. Glover, 3 Camp. 313, 315.]

⁷ [Shrewsbury v. Blount, 2 Manning & Granger, 475; Rawlings v. Bell, 1 C. B. 951.]

⁸ [Pine v. Vanuxem, 3 Yeates (Penn.), 30, 33.]

⁹ [Tidmarsh v. Washington, &c. Ins. Co., 4 Mason, 439.]

¹⁰ [Edwards v. Footner, 1 Camp. 530, 531.]

soliciting agent to induce him to insure enters into the contract as a representation of the company, and if it promises a paid-up policy the insurer is entitled to one, although his policy is silent on the subject.¹ If the false representation of the insured is induced by the false representations of the agent of the insurer, the latter cannot set up the insured's misrepresentation.²

§ 189. **Representation in Part true and Part false; Entire Contract.** — Where the plaintiff insures for a specific sum on a store, and another specific sum on the stock of goods therein, and gives one note for the premium on both sums, representing them to be his store and goods, when in fact he has no title to the store, the contract being entire, the misrepresentation vitiates it, so that nothing can be recovered for the loss of the goods which were admitted to belong to the insured.³ So where the property is represented to be unincumbered, when in fact it is in part covered by a mortgage.⁴ [Where distinct classes of property separately valued are insured, though for a gross premium, the contract is severable, and a misrepresentation as to ownership of real

¹ [Southern Mut. Life Ins. Co. v. Montague, 84 Ky. 653. A railroad company is liable for false statements on its time-tables when prejudicial to others: Denton v. G. N. Ry. Co., 5 E. & B. 860; as where a train is taken off without notice to the public.]

² [Cook v. Lion Fire Ins. Co., 67 Cal. 368.]

³ Day v. Charter Oak Fire & Mar. Ins. Co., 51 Me. 91; Lovejoy v. Augusta Mut. Fire Ins. Co., 45 id. 472; Hinman v. Hartford Fire Ins. Co., 36 Wis. 159; Bowman v. Franklin Fire Ins. Co., 40 Md. 620; Gottsman v. Insurance Co., 56 Pa. St. 210; Kreutz v. Niagara, &c. Ins. Co., 16 U. C. (C. P.) 131; Russ v. Mut. Fire Ins. Co., 29 U. C. (Q. B.) 73; Moore v. Virginia Fire, &c. Ins. Co., 23 Grat. (Va.) 508; Plath v. Minnesota, &c. Ins. Co., 23 Minn. 479; *post*, §§ 277, 278.

⁴ Friesmuth v. Agawam Mut. Ins. Co., 10 Cush. (Mass.) 587; Smith v. Empire Ins. Co., 25 Barb. (N. Y.) 497; Gould v. York County Mut. Fire Ins. Co., 47 Me. 403. *Contra*, Koontz v. Hannibal Sec. Ass., 42 Mo. 126; Loehmer v. Home Mut. Ins. Co., 19 Mo. 628; Phoenix Ins. Co. v. Lawrence, 4 Met. (Ky.) 9. Two houses were separately valued in the same policy. Both were burned. The policy provided that if left vacant without notice and consent, the policy should be void. One was vacant, and had been for the specified period at the time of the fire. The court held that recovery could be had for the occupied house, but not for the unoccupied one. Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164; Commercial Ins. Co. v. Spankneble, 52 id. 53. But see Lovejoy v. Augusta Mut. Fire Ins. Co., *supra*. And see also *post*, § 277.

estate not made in bad faith will not vitiate the policy as to the personalty it covers.¹ (a)]

§ 190. **Effect of Change of Circumstances pending Negotiation.** — A representation is a continuous statement from the time it is made, during the progress of the negotiations, and down to the time of the completion of the contract; so that though in point of fact the representation be true when actually made, yet if by some change intervening between that time and the time of completion of the contract it then becomes untrue, it will avoid the contract if the change be material and to the prejudice of the insurers, or be such as might probably influence their opinion as to the advisability

¹ [Schuster v. Dutchess County Ins. Co., 102 N. Y. 260, 263-266.]

(a) In Wisconsin it is held that a change in the title to one of several farms or buildings covered by a fire policy, and situated at some distance from each other, does not render the policy void as to the other farms or buildings, under the clause in the policy making it void in case of a change of title without the insurer's consent: *Loomis v. Rockford Ins. Co.*, 77 Wis. 87; but that insurance on a building and its contents, with the risk distributed part to the realty and part to the personalty, is a single, indivisible contract, and, under a general forfeiture clause, a circumstance which bars a recovery for a loss on part of the property bars a recovery for all. *Carey v. German-American Ins. Co.*, 84 Wis. 80; *Woracher v. New Denmark M. H. F. Ins. Co.*, 102 Wis. 88. See *Teutonia Ins. Co. v. Howell* (Ky.), 54 S. W. 852; *Continental Ins. Co. v. Ward*, 50 Kansas, 346; *German F. Ins. v. Fairbank*, 32 Neb. 750. So insurance upon distinct lots of personalty on the same premises, with the risk distributed to each item, is one indivisible contract. *Burr v. German Ins. Co.*, 84 Wis. 905; 36 Am. St. Rep. 905, and note; *Manchester F. Ins. Co. v. Glenn*, 13 Ind. App. 365. A similar principle, as to

indivisibility of contract and its result, has been applied where a life insurance agent agreed to extend a premium note on condition that the insured would pay a personal debt to the agent; and a failure to perform the condition which was the sole consideration for the renewal, left the contract void. *Union Cent. L. Ins. Co. v. Berlin*, 90 Fed. Rep. 779.

When a single policy covers both a house and the personal property therein, arson intended and carried out as to the personalty also avoids the policy as to the realty. *Names v. Dwelling-house Ins. Co.*, 95 Iowa, 642; *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88. See *Manchester F. Ass. Co. v. Koerner*, 13 Ind. App. 372. So if a house and personal property therein are insured together, and there is fraud in the proofs of loss as to the personalty, insurance cannot be recovered for the house. *Home Ins. Co. v. Connally* (Tenn.), 56 S. W. 828.

In Massachusetts, it is held that when only one premium is paid for fire insurance on two buildings, the insurance is entire, and the contract, if partly void because of misdescription, is wholly void, and cannot be apportioned. *Thomas v. Commercial Union Ass. Co.*, 162 Mass. 29.

of accepting the risk. The law regards it as made at the instant the contract is entered into.¹ And the same rule applies in case of concealment. Any change in the state of health of the person or condition of the property to be insured, pending the negotiations, if such changes would naturally have any influence upon the judgment of the insurers, must be made known, as the state of facts existing at the time of the completion of the contract will be deemed to have been the basis of the contract.² And a change from a state of good health to serious illness, or from a mild to an aggravated form of the same disease, is a change which ought to be disclosed.³ Where, however, one company assumes the risks of another and issues a new policy, the representations are only held to be true when the original policy was issued.⁴ Where renewals are made upon the statements in the original application, whether the truth of the statement is to be tried by the circumstances existing at the time of the renewal, or at the time when the original application was made, is a question upon which the authorities do not agree; some taking the view that a renewal makes a new contract,⁵ and others that it merely continues the old one.⁶ Special circumstances, however, seem to control the decision, according as these circumstances indicate the intent of the parties.⁷ So where a recent purchaser

¹ *Trail v. Baring*, 4 Giff. 485; s. c. affirmed on appeal, 10 L. T. N. S. 215; *Whitley v. Piedmont, &c. Ins. Co.*, 71 N. C. 480.

² *British Eq. Ins. Co. v. Great West. Ins. Co.*, 38 L. J. Ch. 132; s. c. on appeal, 20 L. T. N. S. 422; *Calvert v. Hamilton Mut. Ins. Co.*, 1 Allen (Mass.), 308; *Lishman v. Northern, &c. Ins. Co.*, L. R. 10 C. P. (Ex. Ch.) 179; s. c. 4 Ins. L. J. 394; *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622; *post*, §§ 250, 294; *De Camp v. New Jersey, &c. Ins. Co.*, C. Ct. (N. Y.), 3 Ins. L. J. 89; *Piedmont, &c. Ins. Co. v. Ewing*, 92 U. S. 377, 380.

³ *Wemyss v. Med. Invalid & Gen. Life Ins. Soc.*, 11 Ct. of Sess. (Scotch), 2d series, 345; *Piedmont, &c. Ins. Co. v. Ewing*, 92 U. S. 377, 380.

⁴ *Cahen v. Continental Life Ins. Co.*, 69 N. Y. 300, 308; *Cheever v. Union, &c. Ins. Co.*, 4 Am. Law Record, 155; s. c. 5 Big. Life & Acc. Ins. Cas. 458.

⁵ *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Brueck v. Phoenix Ins. Co.*, 59 N. Y. 1; *Atkin v. Nat. Ins. Co. (Q. B.)*, Montreal, 3 Ins. L. J. 78.

⁶ *New Eng. Fire & Mar. Ins. Co. v. Wetmore*, 32 Ill. 221; *Baltimore Fire Ins. Co. v. McGowan*, 16 Md. 47.

⁷ *Driggs v. Albany Ins. Co.*, 10 Barb. (N. Y.) 440; *Anrora, &c. Ins. Co. v. Kranich*, 36 Mich. 289; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164; *Phelps v.*

applied for a policy, and at the suggestion of the insurer's agent took an assignment of the policy existing, a representation which was false at the time the policy was issued, but was true at the time it was assigned, was held not to vitiate the contract.¹ In the reinstatement of a lapsed policy no statement of intermediate changes need be made unless required.² And where the policy was to take effect only on the *actual* payment of the premium, and a change was made prior to the payment of the premium and the delivery of the policy, but after its date, it was held that intermediate changes were not an increase *after* the making of the contract.³ In some cases it is expressly stipulated that the renewal shall be upon the express understanding that the original representations remain true at the time of renewal.⁴ But where a renewal certificate is taken out, with distinct notice to the insurers that the property returned has been removed from the premises described in the policy to other premises, the renewal contract will cover the property insured in its new location. This must have been the intent of the parties, certainly the intent and understanding of the

Gebhard Ins. Co., 9 Bosw. (N. Y.) 404. In a New Brunswick case it appears that the company already insuring by a policy which expired October 2, 1866, notified the insured that it would run for a year upon the same terms, whereupon the insured, October 6, paid the amount of the premium to the local agent, the receipt of the premium being indorsed by the local agent on the back of the notice. This local agent afterwards, without the knowledge of the insured, took out a policy upon the same property from another company, based on the application filed with the first company, dated October 6, and expressly insuring for one year from October 2d. October 13, the property was destroyed by fire; but without the knowledge of this fact the policy in the name of the insured was forwarded by the local agent of the first company, who acted also for the second company, to the original insured. Under these peculiar circumstances this was held to amount substantially to a reinsurance, that the policy related back to October 2d, that the representation must be understood to be made as of that date, and that the insured might recover in his own name, having accepted the policy taken out in his behalf by the local agent. *Giffard v. Queen Ins. Co.*, 1 Hannay (N. B.), 432. A second renewal with changes, after a first renewal with different changes, is a renewal of the original contract, with the changes stated in the last. *Honnick v. Phoenix Ins. Co.*, 22 Mo. 82.

¹ *Chapman v. Gore Dist. Mut. Ins. Co.*, 26 U. C. (C. P.) 89.

² *Day v. Mut. Benefit Life Ins. Co.*, Sup. Ct. (D. C.), 1 McArthur, 41.

³ *Fourdrinier v. Hartford Fire Ins. Co.*, 15 U. C. (C. P.), 403.

⁴ *Liddle v. Market Fire Ins. Co.*, 29 N. Y. 184; *Lancey v. Phoenix Ins. Co.*, 6 Me. 562.

insured, as the insurers must have known; and it was also their intent and understanding, unless they designed to defraud under the guise of the contract, which will not be presumed.¹ And a consent to a removal of property insured is also a new contract, and waives a forfeiture by reason of known additional risks prohibited by the original policy.²

§ 191. **Subsequent Changes immaterial.** — If the agreement be complete, whether the policy be delivered and the premium paid or not, it is immaterial that there has been a change since the agreement, or even a loss.³ If a warranty or representation be true when the bargain is closed, any usual and ordinary changes subsequent to that time will be inoperative to vitiate the contract unless prohibited, and courts will not favor attempts which are sometimes made to convert an affirmative into a promissory or continuing representation or warranty. Thus, when it is represented that a building "is used only for the purpose of meeting of a band during two evenings of the week," the representation applies merely to the then existing use of the building, not to the future use of the property.⁴ So if it be described as an "unoccupied" house, "but to be occupied by a tenant;" or in answer to the question about occupation it is said that it "will be occupied by a tenant," — this is neither a warranty that it shall continue unoccupied, nor that it shall be occupied, but rather a representation true, if such was the fact, of the existing state of things, and a statement of an expectation that it would be so occupied, with a reservation of the right to have it so occupied; and such statements are not to be treated as limiting the use of property so as to deprive the insured of the enjoyment of it as is usual in such cases.⁵

¹ *Ludwig v. Jersey City Ins. Co.*, 48 N. Y. 379. And see *post*, § 294.

² *Rathbone v. City Fire Ins. Co.*, 31 Conn. 193; *Dickson v. Provincial Ins. Co.*, 24 U. C. (C. P.) 157.

³ *Southern Life Ins. Co. v. Kempton*, 56 Ga. 339; *ante*, § 135; *Ellis v. Albany, &c. Fire Ins. Co.*, 50 N. Y. 402; *Inbusch v. Northwestern Nat. Ins. Co.*, 4 Ins. L. J. 545, *coram* Dixon, arbitrator; *Franklin Fire Ins. Co. v. Colt*, 20 Wall. (U. S.) 560; *City of Davenport v. Peoria Mar. & Fire Ins. Co.* 17 Iowa, 276.

⁴ *Blood v. Howard Fire Ins. Co.*, 12 Cush. (Mass.) 472.

⁵ *Hughes v. City Fire Ins. Co.*, 27 Conn. 10; *O'Neil v. Buffalo Fire Ins. Co.*, 3 Comst. (N. Y.) 122; *Herrick v. Union Mut. Fire Ins. Co.*, 48 Me. 558. See § 156.

So, where it is said that "a clerk sleeps in the store;"¹ or that "barns are used for hay, straw, shelter, and stabling;"² and, generally, when the statement is as to the employment or habits of a person, or the manner in which a building is occupied or used, or the amount of other insurance, or the intentions of the applicant.³ Such statements are properly to be regarded as descriptive of present status, condition, and expectation, and not as importing a promise as to future use or conduct. If insurers wish to control such use, they must do it expressly and by apt words, and not expect the courts to aid them by construction.⁴ So if it is stated in the policy that the adjoining land is "vacant," this does not warrant that it shall continue so, and the insured may erect buildings thereon though the risk to the property insured be thereby increased.⁵

§ 192. **Oral Statements prior or subsequent to Application immaterial.** — If a written application be made, it will be presumed to contain the representations which induce the contract, and proof of prior or subsequent verbal statements is inadmissible;⁶ and especially if it be an oral representa-

¹ *Frisbie v. Fayette Ins. Co.*, 27 Pa. St. 325.

² *Billings v. Tolland County Mut. Ins. Co.*, 20 Conn. 139.

³ *Horton v. Equitable Life Ass. Soc.*, New York City Court of Common Pleas, Daly, J., 2 Big. Life & Acc. Ins. Cases, 108; *Reichard v. Manhattan Life Ins. Co.*, 31 Mo. 518; *Benham v. United Guarantee & Life Ass. Co.*, 7 Exch. 744; *ante*, § 188; *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102; *Forbush v. Western Mass. Ins. Co.*, 4 Gray (Mass.), 337, 338; *post*, § 306; *Knecht v. Mutual, &c. Ins. Co. (Pa.)*, 8 Ins. L. J. 639.

⁴ *Smith v. Mechanics' & Traders' Mut. Fire Ins. Co.*, 32 N. Y. 399; *Langdon v. New York Equitable Ins. Co.*, 1 Hall (N. Y. Superior Ct.), 226; s. c. 6 Wend. (N. Y.) 623; *Rafferty v. New Brunswick Fire Ins. Co.*, 3 Harr. (N. J.) 480; *Boardman v. Merrimack Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 583; *Hall v. People's Mut. Fire Ins. Co.*, 6 Gray (Mass.), 185; *Boardman v. New Hampshire Mut. Fire Ins. Co.*, 20 N. H. 551.

⁵ *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y. Superior Ct.), 632.

⁶ *Boggs v. Am. Ins. Co.*, 30 Mo. 63; *Rawls v. Am. Life Ins. Co.*, 27 N. Y. 282; *Howell v. Knickerbocker Life Ins. Co.*, 44 id. 276; *Insurance Co. v. Mowry*, 96 U. S. 544; *Candee v. Citizens' Ins. Co.*, C. Ct. (Conn.), 4 Fed. Rep. 143; *Lamatt v. Hudson, &c. Ins. Co.*, 17 N. Y. 199; *Franklin Fire Ins. Co. v. Martin*, 40 N. J. Law, 568; *Schmidt v. Peoria, &c. Ins. Co.*, 41 Ill. 295; *Pindar v. Resolute Fire Ins. Co.*, 47 N. Y. 114; *Todd v. Liverpool, &c. Ins. Co.*, 18 U. C. (C. P.) 192; *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609. As to fraudulent statements of contents of paper to an illiterate man, see *Keller v. Eq. Fire Ins. Co.*, 28 Ind. 170.

tion as to a future fact, as that a house will be occupied, or will be occupied in a certain way, or not occupied at all, for if it is a mere statement of an expectation honestly entertained, subsequent disappointment will not prove it untrue; and if it is a provision that a certain state of facts shall exist or continue during the currency of the policy, it should be incorporated into the written contract.¹ So as to non-fraudulent representations touching the value of the property insured.² But a reference in the policy to parol statements will authorize proof of what they were.³ And verbal representations may become effectual even as warranties, if written into and made part of the policy.⁴

§ 193. **Equivocal Words and Phrases.** — The question whether there is, or is not, a misrepresentation, not unfrequently turns upon the meaning of a particular word or phrase used in the policy; and in such cases the insured will have the benefit of all reasonable doubts, the construction being most strongly against the insurer as the author of the contract, and also because the court will not go any farther in enforcing a penalty or forfeiture than it feels obliged to by the necessary force of the language used. Thus where the property insured was a stock of goods described as "all of goods usually kept in a country store," and it was represented that no "cotton or woollen waste or rags" were kept in the building, and it appeared that clean white cot-

¹ *Kimball v. Aetna Ins. Co.*, 9 Allen (Mass.), 540; *Alston v. Mechanics' Ins. Co.*, 4 Hill (N. Y.), 329, reversing s. c. 1 id. 510; *Mayor of New York v. Brooklyn Fire Ins. Co.*, 4 Keyes (N. Y.), 465, affirming s. c. 41 Barb. 231. See also *ante*, § 182. In *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609, the court distinguishes those cases of waiver and estoppel based upon the knowledge or conduct relating to existing facts of the insurer inconsistent with an honest intention to enforce a particular condition, and a parol promise, made prior to the execution of the policy concerning some future event. "There is no resemblance," it says, "between a parol variance of a written contract, and a waiver of a condition after it has become binding upon the parties." But this distinction has been by no means observed. The case of *Bilbrough v. Met. Ins. Co.*, 5 Duer (N. Y. Superior Ct.), 587, to the contrary, does not seem to have met with approbation. See also *ante*, § 182.

² *New York Gas Light Co. v. Mechanics' Fire Ins. Co.*, 2 Hall (N. Y.), 108.

³ *Clark v. Manufacturers', &c. Ins. Co.*, 2 W. & M. C. Ct. (Mass.) 472.

⁴ *Campbell v. N. E. Mut. Life Ins. Co.*, 98 Mass. 381; *Higbie v. Guardian Life Ins. Co.*, 53 N. Y. 603.

ton rags were kept in the store, — it was held, that as such rags were ordinarily kept in a country store, and as there was an express provision in the by-laws that “cotton or woollen waste or oily rags” should not be allowed to remain overnight in any building insured by the company, if cotton rags of any kind were excluded it could only be those which, from their nature or condition, are easily inflammable, and for that reason classed with “cotton and woollen waste.”¹ So the question being whether the building was “leased or rented,” it was held to be material to ascertain whether the applicants were lessors. And in another case, where the keeping of gunpowder was prohibited, it was held that this prohibition, on account of the punctuation, was qualified by the general phrase at the end of the condition, “in quantities exceeding a barrel.”²

§ 194. **Affirmative and Promissory Representations; Consequences of Breach different.** — There is an obvious distinction, in the consequences, between a misrepresentation of facts existing at the commencement of a risk and a neglect of duty in regard to a matter occurring afterwards; in other words, between an affirmative and a promissory misrepresentation. In the one case the policy never takes effect, the risk is never assumed; while in the other the risk attaches but is interrupted. It is doubtless upon this distinction that courts have held that the operation of a policy may be suspended, and again, after an interval of suspension, become operative and reattach to the subject at risk.³ No right is acquired in the first case, while in the second a right is acquired which may be forfeited. And the same is true of a concealment of a fact at the time when the contract is entered into, and of a failure to make known some fact which by the terms of the policy is incumbent upon the insured.⁴

¹ *Elliott v. Hamilton Mut. Ins. Co.*, 13 Gray (Mass.), 139. See also *ante*, §§ 166, 176.

² *Insurance Co. v. Slaughter*, 12 Wall. (U. S.) 404. See also *post*, § 243.

³ *Ante*, § 101.

⁴ *Kimball v. Aetna Ins. Co.*, 9 Allen (Mass.), 540; *Obermeyer v. Globe Ins. Co.*, 43 Mo. 573.

§ 195. **Test of Materiality, when Question for Jury.** — Where there is a warranty, no question of materiality of the fact warranted to exist or stipulated for, to be done or omitted, arises. But this question always arises where the fact in dispute is alleged to be a misrepresentation or concealment, except where it is converted into a warranty, by a stipulation that an untrue answer shall avoid the policy. And that is material which, if known to the insurer at the time when the contract was under negotiation, would naturally and probably have induced him either to decline the risk, or to have taken it only upon terms more advantageous to himself.¹ And where this materiality depends upon circumstances, and is an inference to be drawn from such circumstances, and not upon the construction of some writing, it is a question of fact for the jury.²

§ 196. **Fact material, though not directly relating to the Risk.** — And whether the misrepresentation or concealment relates to the risk itself directly, or to some incidental matter from which some inference may be drawn as to the propriety of accepting or declining the risk, the result is the same. If a party makes answers or representations touching such incidental matters, — as, for instance, relative to his pecuniary means or social or business relations, — of such a character that if they had not been made the insurers would have declined the risk, — a question to be submitted to the jury, — then the policy will be void. This point is well illustrated by the remarkable case of *Valton v. National Loan Fund Life Assurance Society*,³ where Schumacher, who was a partner with Martin and Valton, insured his life, and assigned the policy to them in case he should die pending the copartnership, unmarried, Martin taking an active part

¹ *Quin v. National Ass. Co.*, 1 Jones & Cary (Irish), 316; *Merriam v. Middlesex Mut. Fire Ins. Co.*, 21 Pick. (Mass.) 162.

² *Columbian Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507; *Campbell v. New Eng. Mut. Life Ins. Co.*, 98 Mass. 381; *Huguenin v. Rayley*, 6 Taunt. 186; *Morrison v. Muspratt*, 4 Bing. 60; *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466; *Sibbald v. Hill*, 2 Dow Parl. R. 263; *Catlin v. Springfield Fire Ins. Co.*, 1 Sum. (U. S. C. Ct.) 434; *Mut. Benefit Life Ins. Co. v. Miller*, 39 Ind. 475; *Washington Life Ins. Co. v. Haney*, 10 Kans. 525.

³ 20 N. Y. 32. See also *Higbie v. Guardian Mut. Life Ins. Co.*, 53 id. 603.

in effecting the insurance. It was held that the insurer's judgment was the vital consideration as to the materiality of a representation in respect to his inducements to undertake the risk.¹

¹ Upon this point the court observed as follows:—"The judge, among other things, charged the jury that if the insured untruly represented that he was a partner of the firm of Valton, Martin, & Company, or that if he untruly represented that he was the moneyed man of the firm, and either or both of such untrue representations were material to the risk, then the policy was avoided, and there could be no recovery. That if Schumacher was dead in September, 1850, and his occupation that of a merchant at the time the proposals were signed, and the representations of his being a partner, or the moneyed man of the firm, were either not untrue or not material to the risk, then the action was *prima facie* sustained. The defendants' counsel requested the court to charge the jury that if Schumacher himself, or by Martin in his behalf, represented to the agent of the defendants that Schumacher was a partner of the firm of Valton, Martin, & Company, when in fact at that time he was not such partner, and if the defendants would not have issued the policy if the representation had not been made, then the policy was void, and the plaintiffs could not recover. The judge declined so to charge, and the defendants' counsel excepted. The defendants' counsel also requested the judge to charge the jury that if they found that Schumacher himself, or by Martin in his behalf, represented to the agent of the defendants that Schumacher was the moneyed man of the concern of Valton, Martin, & Company, when in fact at that time he was not such, and that the defendants would not have issued the policy if the representations had not been made, then the policy is void, and the plaintiffs cannot recover. The judge refused so to charge, and the defendants' counsel excepted. The charge of the judge was correct as far as given. If the representations were made, and false, the falsity must have been known to Schumacher and Martin. The facts were within their knowledge, and the representations fraudulent. The requests to charge, considered in connection with the charge given, present the question whether fraudulent representations made by the assured to the insurer upon his application for a policy, though not material to the risk, yet material in the judgment of the insurer, and which induced him to take the risk, will avoid the policy. This question has not been determined by any adjudged case in this State, so far as I have been able to discover. The elementary writers hold that the policy may be avoided. 1 Arnould on Insurance, § 189 (original paging, 487-576); 2 Duer, 681-683; 3 Kent, Com. 282. In *Sibbald v. Hill*, 2 Dow's Parl. R. 263, it was held that where the assured fraudulently represented to the underwriter that a prior insurance by another underwriter upon the same risk had been made at a less premium than it was in fact made, the policy was vitiated. In this case it is obvious that the risk itself was not affected by the representations. Lord Eldon, in his opinion, says that it appeared to him settled law, that if a person meaning to effect an insurance exhibited a policy underwritten by a person of skill and judgment, knowing that this would weigh with the other party and disarm the ordinary prudence exercised in the common transactions of life, and it turned out that this person had not in fact underwritten the policy, or had done so under such terms that he came under no obligation to pay, it appeared to him to be settled law that this would vitiate the policy. The courts in this country would say that this was a fraud; not on the ground that the misrepresentation affected

§ 197. **False Pretence.** — It appears, therefore, to be the rule that a misrepresentation, though not bearing upon the character of the risk, if such as to mislead the insurers into taking a risk which otherwise would not have been taken, is as fatal to the validity of the policy as if it had related to the nature of the risk. Thus, by way of additional illustration, where one insurance company applied to another for reinsurance on certain articles of personal property, and induced the reinsurers to believe that they had insurance on the buildings, which was not the fact, the policy was held to be void.¹ This is, however, not strictly a misrepresentation of facts upon which the value of the risk is determined, but rather a false pretence of a fact which induces the insurer to take the risk without inquiry as to its value. If the false pretence does not induce the contract, it is immaterial.² So where the reinsurer declared his intent to retain a portion of the risk, but subsequently reinsured that, the first reinsurance was held to be void.³

§ 198. **Representation, Substantial Compliance; Equivalents.** — A representation is substantially complied with by the adoption of precautions, which, if not those exactly stated in the application, may be such as tend to accomplish the same purpose and are regarded as equally efficacious. Thus, if benzine be prohibited in the policy, and permitted in an indorsement thereon, to the amount of one barrel to be kept in tin cans, keeping the whole in one tin can is a substantial compliance, if that is shown to be equally safe.⁴ So if ashes

the nature of the risk, but because it induced a confidence without which the party would not have acted. The principle of this case, when applied to the one under consideration, shows that the judge committed an error in refusing to charge as requested. It is clear that the circumstance of a party being engaged in commercial business, possessed of large means, might induce an insurer to make an insurance upon his life for a large amount, while were he a mere porter the risk would be rejected, although the chance of life would be as good in the latter situation as the former."

¹ Louisiana Mut. Ins. Co. v. New Orleans Ins. Co., 13 La. An. 246. See also Sibbald v. Hill, 2 Dow Parl. R. 263; Bennett v. Anderson, 3 Big. Life & Acc. Ins. Cas. 342.

² Canada Ins. Co. v. Northern Ins. Co., 2 Ont. App. Rep. 373.

³ Trail v. Baring, 4 Giff. (Ch.) 485; s. c. 2 Big. Life & Acc. Ins. Cas. 644.

⁴ Maryland Fire Ins. Co. v. Whiteford, 31 Md. 219.

are stated to be kept in brick, if they are kept in some other mode, equally safe, the policy will not be avoided.¹ Where the stipulation is a representation and not a warranty, there is room for the substitution for equivalents amounting to a substantial performance; while if it be a warranty it is at least doubtful whether the doctrine can or ought to have any place, as one of the objects of a warranty is to obviate the necessity of dispute about the materiality or immateriality of a particular act. By a substantial compliance is meant the adoption of precautions, intended for the same purpose, adapted to it, and which may be reasonably regarded as equally or more efficacious. For instance, when it is said that ashes are taken up in iron hods, it would be a substantial compliance if brass or copper were used instead. So if it be represented that casks of water, with buckets, are kept in each story of the building insured, if a reservoir be placed above, with pipes to convey water to each story, and regarded by skilful and experienced persons to be equally efficacious, it would be a substantial compliance.²

§ 199. **Means of Putting out Fires;**³ **Substantial Compliance; Good Faith.** — While courts will sometimes sustain a merely literal and colorable compliance with a warranty as sufficient,⁴ yet where representations are made as a full, just, and true exposition of all facts and circumstances material to the risk, in construing them, whether as to existing facts or as to future precautions to be taken, both good faith and the terms of the contract require that there shall be a substantial, as well as literal, conformity. Such representations must be construed with reference to the known and obvious requirements and purposes of the insurers, and so as to meet these requirements, and conform to them, if such a construction can be made without violence to the language used. If, for example, inquiries are made relative to the appliances for extinguishing fire in a factory, and it is answered that water casks are kept in each room, while the

¹ *Underhill v. Agawam Mut. Ins. Co.*, 6 Cush. (Mass.) 440.

² *Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Met. (Mass.) 114.

³ [See § 157.]

⁴ *Ante*, § 178.

answer would be literally true if no water were kept in the casks, or if the casks, though kept filled with water, were few in number or so insignificant in size as to afford practically no security in the sense understood and required by the insurers, this would not be a full, just, and true statement of the facts, nor a substantial compliance with the undertaking of the insurer. That undertaking requires a substantial compliance, by keeping a cask or casks of water, of a size adequate to the required security, and holding a sufficient quantity of water to aid essentially in extinguishing a fire in its early stages in that part of the building.¹ And the same good faith requires that these casks should be kept supplied with water, though the fact that from the negligence of servants, or from freezing or other unavoidable cause, they might be rendered temporarily unserviceable, would not avoid the policy, if reasonable diligence be used in restoring them to a serviceable condition;² nor if it be represented that one of the appliances for extinguishing fires be hose attached to a flume above the mill, does this imply an agreement that there shall always be water in the flume, as, for instance, in the contingency of a drought.³ [The adequacy of a water supply warranted to be kept on top of the house is for the jury. A tank two feet by three by three on the roof just below the apex, is not insufficient as a matter of law.⁴] And if a policy be delivered and become operative upon a promissory warranty that certain appliances for extinguishing fires are to be put in, this amounts at most to an agreement that they shall be put in within a reasonable time; and the company, having the right to cancel the policy, should so elect and notify the insured, else they cannot avoid liability on account of unreasonable delay.⁵

¹ *Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Met. (Mass.) 114; *Garrett v. Prov. Ins. Co.*, 20 U. C. (Q. B.) 200.

² *Aurora Fire Ins. Co. v. Eddy*, 49 Ill. 106; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416.

³ *Le Roy v. Park Ins. Co.*, 39 N. Y. 56. And see *ante*, § 171.

⁴ [*Sierra Milling, &c. Co. v. Hartford Fire Ins. Co.*, 76 Cal. 235.]

⁵ *Howell v. Hartford Fire Ins. Co.*, U. S. C. Ct. North Dist. Ill., 1873, per Blodgett, J., 3 Ins. L. J. 649.

CHAPTER X.

OF CONCEALMENT.

ANALYSIS.

1.

§ 200. A concealment is the intentional (not merely inadvertent) withholding of some material fact which in good faith the insurer ought to know ; see also § 207.

The burden of proof as to materiality is on the company, and the question is for the jury. Expert may be asked if the fact would increase the premium, § 200 n.

§§ 201-206. If truth and *fulness* are warranted the questions of intent, inadvertence or ignorance do not arise. The knowledge of his agent of a fact unknown to the insured has been imputed to him to avoid such a policy, §§ 201, 206.

Where the agent does not act in the transaction to which the notice relates his knowledge is not imputed to the principal, § 122 n.

The better opinion does not hold the insured for lack of stating what he without fault does not know, or what he has a right to believe immaterial, presuming him to know and believe what men of ordinary intelligence know and believe under similar circumstances, § 203.

Knowledge of the insured a question for the jury, § 202.

Cases harmonized on their facts, §§ 203, 205.

2.

§ 207. Facts known to the insurer or his agent or which ought to be known to him (the means of information being in his possession to the knowledge of both parties, or usage or general public knowledge being sufficient to inform him), facts which lessen or do not increase the risk and remotely connected details not inquired about, need not be stated ; see also § 215 B.

If inquiry is made, concealment is fatal though the fact is not material.

The knowledge of the company must be as definite as that of the assured to excuse non-disclosure. If a fact concealed comes to company's knowledge before issue of policy it is bound by the issue.

If no inquiries are made the insured's *intent* is an essential question.

Less strictness in fire than in marine insurance, for in the for-

- mer the insurer is less dependent on the insured for information.
- § 208. Threats of burning or attempts to set on fire the house insured, or a neighboring one, must be disclosed.
 Informing the agent is sufficient if no questions are asked in the application.
 Facts occurring after issue of a policy must be notified to company, if by-laws that are made part of the contract so require.
- § 209. A general statement of the facts sufficient to put the insurers on inquiry is enough. Mere idle talk not worthy of the regard of a prudent person need not be communicated.

3.

- §§ 210, 211. When there is room for opinion, an honest view such as a man of ordinary prudence and intelligence would take under the circumstances, though an erroneous one as it may afterward prove, is no misrepresentation, especially if the company's agent arrived at a similar judgment, § 211.
 as "What houses *endanger* the one insured?" or "Is there a livery-stable in *vicinity*?" or "Have you had any serious illness?" or "one tending to shorten life?"
- § 212. An equivocal answer, or statement of only part of the truth may be a concealment.

4.

- § 213. Agent's concealment imputed to principal; but one simply referred to by the insured, who merely states his belief in their truth, cannot prejudice him by misrepresentations or concealment unknown to him. Broker to procure is agent of assured; one insurance agent going to another of his own notion, not.
- § 214. Where A insures the life of B, statements concerning his health by the person whose life is insured (B) made *at or about* the time when he signed the application, have been admitted on the ground that they were a part of the *res gestæ*. If made long before or after the application they are not admissible, for the declarant is not a party in interest to the contract, nor an agent of the insured.
- § 215 D. Ordinary diligence in sending information is all that is required, though a special message might have saved the company.

5.

- Matters not material*, unless made so by agreement or inquiry:
 prior insurance, § 207.
 threat of burning some months before during election excitement, § 208.
 idle talk, § 209.
 character of tenants, § 207.
 or of adjoining buildings, § 207.
 erection of new building, § 207.
 personal dislike to insured, §§ 207, 215 B.
 pending litigation, § 207.

how building is heated or lighted, §§ 207, 215 B.
 void tax title, § 207.
 damaged goods on board, § 207.
minor details, § 207.
 insured's opinion as to derangement of functions, § 215.
 incumbrance in case of insurance in stock company, § 215.
 insured insolvent, § 215 B.
 risk in same block declined, § 215 B.
 agreement between mortgagor and mortgagee as to payment of premium, § 215 B.
 brick oven, § 215 C.
 fact decreasing risk, § 215 C.
 sensations, apprehensions, § 215 C.
 opinions, §§ 210, 211.
 disclosure of fact in reference to which there is a warranty, is unnecessary, § 215 C.

Material facts:

threats of burning in general or attempts to set the house or a neighboring one on fire, § 208 ; but see § 207.
 idle talk not material, § 209.
 single woman had child year or two before, § 215.
 pregnancy, § 215.
 incumbrance in case of mutual insurance, § 215.
 prior applications, § 215, but see § 188 C.
 warehouse erected within forty-one feet, § 215 A.
 benzine in adjoining building, where policy prohibits, § 215 A.
 probable loss of vessel, § 215 A.

Materiality a question for jury:

carpenter work going on, § 207.
 double occupancy of house, § 207.
 assured in prison, § 215.
 insane twenty years before, § 215.
 release of carrier from liability, § 215 A.

In France, where concealment not sufficient to avoid policy the company may deduct the additional premium that would have been charged if the truth had been known, § 215 B.

§ 200. **Concealment defined.** — Representations should not only be true, but they should be full. The insurer has a right to know the whole truth. And a lack of fulness, if designed, in a respect material to the risk is tantamount to a false representation, and is attended by like consequences. This lack of fulness is termed a *concealment*, which is the designed and intentional withholding of some fact material¹

¹ [When the company sets up concealment as a defence, the burden is on it to show materiality. *Insurance Co. v. Folsom*, 18 Wall. 237, 253. The questions of materiality, facts, and non-disclosure are for the jury. *New York Firemen's Ins. Co. v. Walden*, 12 Johns. 513, 520 ; *Richmondville Union Seminary v.*

to the risk which the insured in honesty and good faith ought to communicate to the insurer. (a) It is not mere unintentional silence or inadvertence. It is a positive intentional omission to state what the applicant knows, or must be presumed to know, ought to be stated. It is a suppression of the truth whereby the insurer is induced to enter into a contract which he would not have entered into had

Hamilton Ins. Co., 14 Gray, 459, 465; *Von Lindenean v. Desborough*, 3 C. & P. 353, 356. Whether particular facts if disclosed to an underwriter would, in the opinion of a witness conversant with the business of insurance, as a matter of judgment, make a difference as to the amount of premium, is admissible evidence. But he cannot be asked what he himself would probably have done under the circumstances. *Berthon v. Loughman*, 2 Stark. 258, 259.]

(a) See *Niagara F. Ins. Co. v. Miller*, 120 Penn. St. 504; *Queen Ins. Co. v. Young* (86 Ala.), 11 Am. St. Rep. 51, 58. The obligations of good faith also require the insurer to deal openly and fairly with the insured. In Michigan the law is thus defined by *McGrath, J.*, in *Hartford Steam Boiler Insp. & Ins. Co. v. Cartier*, 89 Mich. 41, 48; "Conditions and restrictions in insurance policies, to be binding upon the insured, must be inserted without fraud, misrepresentation, or concealment. In order to charge the insured with the duty of an examination of his policy with reference to new matter introduced into it, he must be left free to discharge that duty unaffected by the company's representations, and not be led to neglect it by the conduct of the company itself. The company cannot be allowed to evade his questions, mislead him, suppress the truth, and lull him to sleep regarding new restrictions which it has injected into the policy, and thereafter charge him with constructive knowledge of those restrictions."

In this case, where the insured cancelled a policy in the H. Company according to its terms, and substituted one in another company at a lower rate, and the agent of the H. Company induced him to cancel the latter and accept another in the H. Company at still lower rates, but, unknown to the

insured, the last policy, unlike the first, provided that, if cancelled to take out insurance in another company, the premium should be forfeited, and on being told that the other company would grant a yet lower rate, the agent merely said that they would not be able to do so, it was held, in an action by the H. Company to recover the premium on the cancellation by the insured of the last policy, that there had been concealment by the agent, and that the provision against cancellation was invalid. As to insured's duty to read his policy, see *supra*, § 144 D, note (a).

Neglect to answer a question is not a fraudulent concealment. *Parker v. Otsego County Farmers' Co-op. F. Ins. Co.*, 62 N. Y. S. 199. The Code of Iowa providing that a copy of the application shall be attached to the policy, and that neglect shall not render the contract invalid, but such application or falsity thereof cannot be pleaded or proved by the company, nor be necessary to recovery by insured, who may plead or prove them at his option, does not apply to such representations as appear on the face of the policy; and where the latter required the title, if less than the fee, to be so expressed thereon, failure to attach the application will not prevent the company from showing concealment. *MacKinnon v. Mutual F. Ins. Co.*, 89 Iowa, 170.

the truth been known to him. It is a deception whereby the insurer is led to infer that to be true, as to a material matter, which is not true. Hence, strictly speaking, under the general law of insurance, there can be no concealment of a fact which is not known to the applicant.¹

§ 201. **Where Truth and Fulness warranted, how.** — Where, however, the truth and fulness of a statement are warranted, it is no longer a question of concealment, but of the truth and fulness of the statement; and any failure to disclose a material fact, even though accidental, and by inadvertence or through ignorance, is followed by the same consequences as if intentionally concealed. And it has accordingly been held that all known facts material to the risk, if called for, must be disclosed, whether the party seeking insurance think them material or not, upon the ground that the question as to the belief of the party with regard to the materiality of the fact would in many instances be difficult to decide, and it would encourage suppression if that were the issue upon which the question of concealment should turn, while if the materiality alone of the fact be made the issue, then it becomes the interest of the assured to state all the facts he knows.² And since the knowledge of an agent may be imputed to the principal, and is constructively his, he may be guilty of concealing a fact of which he has no actual knowledge. Thus, where an agent wrote to his principal to cause his vessel to be insured, after an accident which led

¹ *Sprott v. Ross*, 16 Ct. of Sess. Cas. (Scotch) 1145; s. c. 3 Big. Life & Acc. Ins. Cas. 421; *Ross v. Bradshaw*, 1 W. Bl. 312; s. c. 4 Big. Life & Acc. Ins. Cas. 574; *Swete v. Fairlie*, 6 C. & P. 1; *Hall v. People's Mut. Ins. Co.*, 6 Gray (Mass.), 185; *Merchants' & Manufacturers' Ins. Co. v. Wash. Mut. Ins. Co.*, 1 Hand (Ohio), 408; *Mut. Benefit Life Ins. Co. v. Robertson*, 59 Ill. 123; *Gerhauser v. North B. & M. Ins. Co.*, 7 Nev. 174; *Forbes v. Ed. Life Ass. Co.*, 10 Ct. of Sess. Cas. (Scotch) 451; *Life Ass. of Scotland v. Foster*, 11 Ct. of Sess. Cas. 3d series (Scotch), 351; s. c. 4 Big. Life & Acc. Ins. Cas. 520. And see *post*, § 211; *Swift v. Mass. Mut. Life Ins. Co.*, 63 N. Y. 186.

² *Lindeneau v. Desborough*, 3 Man. & Ry. 45; *Vose v. Eagle Life & Health Ins. Co.*, 6 Cush. (Mass.) 42; *Miles v. Conn. Mut. Life Ins. Co.*, 3 Gray (Mass.), 580; *Geach v. Ingall*, 14 M. & W. 95; *Mut. Benefit Life Ins. Co. v. Miller*, 39 Ind. 475; *Day v. Mut. Benefit, &c. Ins. Co.* (Sup. Ct. D. C.), 4 Big. Life & Acc. Ins. Cas. 15; *Abbott v. Howard, Hayes* (Irish), 381; s. c. 3 Big. Life & Acc. Ins. Cas. 294. See also *post*, § 206.

to the loss of the vessel had happened, but did not mention to his principal, the owner, the fact of the accident, it was held that as the agent ought to have communicated the fact of the accident, the concealment was constructively that of the owner, and he could not recover on a policy which he had effected in good faith.¹

§ 202. **If the fact be not known, how.** — On the other hand, it has been held with better reason that there is no concealment if the fact omitted be not such as may be fairly presumed to be known and believed to be material by the applicant. (a) Thus, where the applicant had been insane several years before he applied for and took his policy, and had been placed in an insane asylum, whence he was discharged cured, his failure to state the fact at the time he procured his policy, no specific question being asked, but the policy by its terms being void for misrepresentation, fraud, or concealment, was held not to prevent a recovery; and this, although the insured had been for a considerable period a canvassing agent of the insurers, and in a conversation with the president of the company, some time before the policy was taken out, had been told by him that they did not wish to insure insane persons, and had been instructed to be cautious on that point. The conversation, which took place some time previous to the making of the contract, and had for its object to give instructions to the agent, was held

¹ Gladstone v. King, 1 Maule & Sel. 35; *post*, § 202.

(a) The applicant's answers, if made according to his best knowledge and belief, and accepted by the insurer, render it incumbent upon the latter to prove, that, as thus limited, they are untrue. *Clapp v. Mass. Benefit Ass'n*, 146 Mass. 519; *Cobb v. Covenant Mut. Benefit Ass'n*, 153 Mass. 176. A statement in the application that the insured has never been physically injured is not a misrepresentation which will avoid forfeiture where it appears that injuries were sustained at an earlier period of life, the effects of which have wholly disappeared. *Standard Life & Acc. Ins. Co. v. Martin*, 133 Ind. 376. Where the policy provided that it should be void if the insured concealed any material fact, or if the interest of the insured was not truly stated, the insured was held not bound to voluntarily disclose the existence of a mortgage in the absence of any question or representation affecting it. *Morotock Ins. Co. v. Rodefer*, 92 Va. 747. The concealment of an inventory from an adjuster is not the concealment of a "material fact" within the policy, unless the company is injured thereby. *Commercial Bank v. Firemen's Ins. Co.*, 87 Wis. 297.

to have no tendency to show a fraudulent concealment of material facts, unless it could also be shown that the facts omitted were, in the judgment of the insured, material.¹ So where, if the answers were in any respect untrue, the policy was to be void, and the question was whether the applicant had any sickness within the last ten years, and the answer was that he had had pneumonia, but said nothing of a "slight attack of chronic pharyngitis," it was held to be no concealment, as the party was not bound to state such facts as would ordinarily be deemed immaterial, such as that he had had a cold, or a diarrhœa, or an irritation of the throat, not fairly embraced in what is popularly understood as sickness.² In *Hutchison v. National Loan Assurance Society*,³ a warranty that the insured had no disease or symptom of disease was held to import only that, according to the knowledge and reasonable belief of the insured, there was freedom from any disease or symptom of diseases material to the risk, — he not being guilty of any negligence in

¹ *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52.

² *Mut. Benefit Life Ins. Co. v. Wise* (Md.), 2 Big. Life & Acc. Ins. Cas. 43; s. c. affirmed, 34 Md. 582.

³ 7th Ct. of Sess. Cas. (Scotch) 467; *Duckett v. Williams*, 2 Cr. & Mee. 348, distinguished. See also *Life Ass. of Scotland v. Foster*, 11 Ct. of Sess. Cas. 3d series. 351; s. c. 4 Big. Life & Acc. Ins. Cas. 520, where the rule is thus well stated: "Concealment or non-disclosure of material facts, by a person entering into a contract is, generally speaking, either fraudulent or innocent, and in the case of such contracts where parties are dealing at arm's-length, that which is not fraudulent is innocent. But contracts of insurance are in this, among other particulars, exceptional, that they require on both sides *uberrima fides*. Hence without any fraudulent intent, and even in *bona fides*, the insured may fail in the duty of disclosure. His duty is carefully and diligently to review all the facts known to himself bearing on the risk proposed to the insurers, and to state every circumstance which any reasonable man might suppose could in any way influence the insurers in deciding whether they will enter into the contract. Any negligence or want of fair consideration for the interests of the insurers on the part of the insured leading to the non-disclosure of material facts, though there be no dishonesty, may therefore constitute a failure in the duty of disclosure which will lead to the voidance of the contract. The fact undisclosed may not have appeared to the insured at the time to be material, and yet if it turns out to be material, and in the opinion of a jury was a fact that a reasonable and cautious man proposing insurance would think material and proper to be disclosed, its non-disclosure will constitute such negligence on the part of the insured as to void the contract." A covenant not to violate any condition of the policy means any *known* condition. *Vyse v. Wakefield* (Ex. Ch.), 6 M. & W. 442; s. c. 3 Big. Life & Acc. Ins. Cas. 17.

acquiring knowledge of his own condition. So in *Jones v. Provincial Insurance Company*, it was stated by the applicant that he was not "aware of any disorder or circumstance tending to shorten life," when in fact he had had, within a year or two, two severe bilious attacks, about the tendency of which to shorten life the physicians who attended him differed in opinion. And it was said that if the assured honestly believed that these attacks had no tendency to shorten his life, his failure to mention them would not avoid the policy.¹ What other persons of intelligence do not know or believe or apprehend cannot reasonably be expected of the insured. And what he cannot be expected to know, he cannot be considered as culpable for not knowing; and what he cannot be expected to apprehend, he cannot be bound to communicate; and in not communicating any such fact, he cannot be considered as concealing it even inadvertently, much less wilfully.²(a) The knowledge which is imputable to the assured who undertakes to state all material facts, either absolutely or so far as they are known to him, may be actual or constructive. The law, however, does not undertake to decide whether this knowledge exists or not; it is rather a question of fact for the jury. The law will not say that a man must be presumed to know certain particular facts touching his estate; but the question whether certain facts, if misrepresented or concealed, were known to the applicant for insurance, is a question of fact to be found by the jury upon the evidence. And upon this point divers considerations, as authorizing the inference of knowledge, are fit and proper to be submitted to the jury; such as, that the applicant and insured is the owner of the property, and may be presumed to be acquainted with its condition; or, being the life-insured, is cognizant of his own condition; that the matter relates to things open and visible, things capable of distinct knowledge, and not depending upon esti-

¹ 3 C. B. N. S. 65. See also *post*, § 210.

² *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125, per Whitman, C. J. See *post*, §§ 210, 211.

(a) See page 402, note (a).

mate, opinion, or mere probability; things in respect to which an owner is bound in honesty and good faith to know, takes upon himself to know, and usually does know, — these and all other pertinent matters of evidence bearing upon the question, are to be left to the jury, with directions that if they are satisfied from all the evidence, and can reasonably infer that the assured did know the fact in regard to which misrepresentation or concealment is imputed, they are to find that he did know it; otherwise not.¹

§ 203. The cases cited in the last section are apparently not in accord with *Lindeneau v. Desborough and Vose v. Eagle Life and Health Insurance Company*, cited in the preceding section. And certainly the language of these cases, more particularly the latter, as where it is said that, though there be no warranty, the concealment of a material fact will avoid the policy, though the concealment be the result of accident or negligence and not of design, would seem to lay down an entirely different and much more stringent rule. On examination of the cases, however, it will be seen that the facts required no such decision. In both cases the facts undisclosed were such as in the opinion of the court the applicant knew or ought to have known. The question propounded seemed to Lord Tenterden, C. J., in the former case, to be one "calling for an answer stating all the facts which any reasonable man might think material;" and in the case from Massachusetts the court say that the insured, being inquired of if he had had consumption, "could have stated the symptoms of consumption which he had and which he knew he had." In both cases, therefore, facts were concealed which were known, actually or presumptively, to be material, and they were both no doubt well decided upon the facts. Neither case actually decides upon its facts any-

¹ *Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Met. (Mass.) 114. In *Lewis v. Phoenix Ins. Co.*, 39 Conn. 100, it was held that a statement that the applicant had an insurable interest in the life of the insured, the fact being that there existed the mere relationship of brother on the ground of insurable interest, was false and fatal, the applicant being held to know that the law was as the court then decided it, although it was; and perhaps still is, an open question. See *ante*, § 107.

thing more than that the insured was bound to communicate all facts known to him, and by him believed to be material, presuming that he knew and believed what men of ordinary intelligence know and believe. In this view the cases are reconcilable. And perhaps this will be found to be the true rule, — that there is concealment whenever facts are withheld which are known, or which must be presumed to be known, because they ought to be known to an ordinarily intelligent person, to be material. According to this view, concealment is a violation of good faith, and not a mere error of opinion. Suppose the applicant is inquired of, as in the Massachusetts case, if he has consumption. He is, in fact, afflicted with a cough. But a cough proceeds from various other causes as well as from a disease of the lungs. He has in good faith endeavored to inform himself as to the true causes, and has been informed by his physicians that it does not proceed from the lungs, but from an entirely different cause. It would seem that the insured, who honestly believes, and has reason to believe, that his cough is due to some other cause, ought not to lose the benefit of his insurance, because, when asked if he has disease of the lungs, he does not disclose the fact that he has a cough, even though it should ultimately appear that in point of fact the cough did proceed from a disease of the lungs, and that the applicant in fact had consumption when the insurance was effected. Before the insured can fairly be said to conceal the fact of a particular disease, when he does not disclose the fact that he has symptoms which may or may not indicate the presence of the disease, it would seem that it should at least appear that he knew, or had reason to believe, they were symptoms of the disease inquired about. If the inquiry be to a particular symptom, as if the insured has ever had "spitting of blood," the answer may reasonably be required to be absolute, because of this symptom (of what, perhaps, he might not know) he must have knowledge.¹

¹ See also *post*, § 297. It is worthy of note that in *Mallory v. Travellers' Ins. Co.*, cited in last section, the court refer to *Lindeneau v. Desborough*, *ubi supra*, as one of the authorities upon which they base their decision. They also dis-

§ 204. And this seems to be the doctrine of *Horn v. Amicable Mutual Life Insurance Company*.¹ In that case the applicant was required to name the physician usually employed by him, and if he had none, then to name any other doctor who could be applied to for information upon the state of his health. He answered, "None;" and the fact was that he had occasionally applied to one physician to prescribe for a cough of long standing, accompanied by shortness of breath, and had also secretly applied to another insurance company, when his application was declined upon the examination of the physician of that company.² It was held that as the applicant must have known that both of the doctors could have given important information as to his health, and denied, in effect, that there was any one who could give that information, there was, therefore, a fraudulent concealment, as matter of law. And in the same case the court proceeds to say that in life insurance the statements as to the health of the applicant are representations, and not warranties, and the question is one of honesty and fair dealing; and, referring to the case of *Miles v. Connecticut Mutual Life Insurance Company*,³ observes that that case is founded upon no analogous case of life insurance, unless it be *Vose v. Eagle Life and Health Insurance Company*,⁴ which itself was decided upon the ground of misrepresentation as well as upon that of warranty, upon which last ground no authority is cited in its support. No such rule, however, they proceed to say, has been laid down in New York, and they are unwilling to originate such a doctrine as law. The assured must state all he knows bearing upon the

tinguish the case from those where specific questions are put, with a stipulation that the answers shall be full and true. They also cite *Rawls v. Amer. Life Ins. Co.*, 27 N. Y. 282; *Valton v. National Fund Life Ass. Soc.*, 20 N. Y. 32. See also *Hogle v. Guardian Life Ins. Co.*, 6 Robt. (N. Y. Superior Ct.) 567; *Kelsey v. Universal Life Ins. Co.*, 35 Conn. 225; *ante*, § 200.

¹ 64 Barb. (N. Y. S. C.) 81. This case suggests that the same strictness of construction should not prevail in life policies where knowledge of the facts in many respects cannot be of the same certain character as in fire and marine policies.

² See as to concealing fact of prior application, *post*, § 215.

³ 3 Gray, 580.

⁴ 6 Cush. 42.

condition of his health, and any untrue statement or concealment in this respect ought justly to render the policy void. In all respects where it appears, or can be shown, that the applicant had any knowledge of the facts called for by the interrogatories, it matters very little whether the answer be held a warranty or not, inasmuch as any untrue statement will be a misrepresentation or fraud, which will equally avoid the policy.

§ 205. Indeed, the case of *Campbell v. New England Mutual Life Insurance Company*¹ seems to have been regarded as evincing a disposition on the part of the courts of Massachusetts to modify the severity of the rule which the language of the court in the case of *Vose v. Eagle Life and Health Insurance Company* would seem to require, and which was followed in the subsequent case, in the same State, of *Miles v. Connecticut Mutual Life Insurance Company*. Thus, in *Price v. Phoenix Life Insurance Company*,² which was a case very similar in its facts, the court adopt the views of the Massachusetts case,³ although they say they are well aware that it would be difficult, if not impossible, to reconcile the views expressed in that case with the doctrines laid down in a great number of other cases.⁴

§ 206. Still there is a class of cases where the insured has bound himself, hand and foot, by a stipulation that his application contains a just, full, and true exposition of all the facts inquired for, or its equivalent in a different form of words, and is to be deemed a warranty. Such cases are to be distinguished from those we have been considering. In these, according to the received interpretation, no question of knowledge, good faith, or materiality arises; it is simply a question of the truth and fulness of the answers; and a want of either is fatal. Such policies, under such an interpretation, are practically no security at all. The insured is at the mercy of the insurer; and, if the applicant will be so imprudent as to make such a bargain, the courts cannot help

¹ 98 Mass. 381; *ante*, § 187.

² 17 Minn. 497.

³ 98 Mass. 381.

⁴ And see *post*, § 211.

him.¹ It can scarcely be necessary to add, to secure practical impunity to the insurer, the further stipulation, that "if, after insurance, the risk shall be increased by any means whatever, and the insured shall neglect to notify the company of such increase, such insurance shall be void."²

§ 207. **Facts known to Insurer, or which lessen the Risk; Minor Details.** — A failure to state facts known to the insurer,³ or his agent,⁴ or which he ought to know,⁵ since these he will be presumed to know, or which lessen the risk, for that only is material which tends to increase the risk,⁶ in the absence of express stipulation, and where no inquiry is made, is no concealment. [When no inquiries are made, the intention of the assured becomes material, and to avoid

¹ *Hardy v. Union Mut. Fire Ins. Co.*, 4 Allen (Mass.), 217; *Chaffee v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 376; *Kennedy v. St. Lawrence County Mut. Ins. Co.*, 10 Barb. (N. Y.) 285; *Abbott v. Shawmut Mut. Fire Ins. Co.*, 3 Allen (Mass.), 214; *Shawmut Mut. Fire Ins. Co. v. Stevens*, 9 id. 332; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331. See also *Teutonia Life Ins. Co. v. Beck*, 74 Ill. 165; *Beck v. Hibernia Ins. Co.*, 44 Md. 95; *McDonald v. Law Union Fire & Life Ins. Co.*, L. R. 9 Q. B. 328; s. c. 3 Ins. L. J. 796; *Baker v. Home Life Ins. Co.*, 2 Hun (N. Y.), 402; s. c. affirmed, 64 N. Y. 648; *Bartean v. Phoenix Mut. Ins. Co.*, 67 id. 595; *Jeffries v. Economical Life Ins. Co.*, 22 Wall. (U. S.) 47. We remember to have heard a learned judge, who was giving a reluctant judgment in one of these cases against the insured, observe, with considerable feeling, that if such companies would provide simply that they should never, in any event, be liable in case of loss, they would not only save the courts from much disagreeable duty, but would be free from the suspicion of having purposely entrapped the insured. See also *ante*, § 180 *a*.

² *Pottsville Mut. Fire Ins. Co. v. Horan* (Pa.), 9 Ins. L. J. 201.

³ [If a company elects to issue a policy after becoming aware of a disaster to the property, *though known by the plaintiff and concealed at the time of application*, the plaintiff may recover. *Royal Can. Ins. Co. v. Smith*, 5 Russ. & Geld. (Nova Sco.) 322, *Weatherbee, J.*, dis. Knowledge of the insurer equal to that of the insured, makes disclosure unnecessary. Where, however, the assured's knowledge is particular and definite, while that of the insurer is only general, disclosure must be made. For example, knowledge of a particular gale where the assured's ship was must be given to the insurers before the issuing of the policy, although they already know that there have just been severe gales in that region. *Moses v. Delaware Ins. Co.*, 1 Wash. 385, 388.]

⁴ [The applicant is not bound to disclose what the agent knows. *Richards v. Wash. Fire & Mar. Ins. Co.*, 60 Mich. 420.]

⁵ [When the insurer has the means of knowledge at hand, and both parties are aware that such is the case, it is probable that he cannot set up the failure to disclose such fact as a defence. *Bates v. Hewitt*, 4 F. & F. 1023, 1031.]

⁶ [When the matter concealed could have in no way increased the risk, the concealment is immaterial. *Lexington Ins. Co. v. Paver*, 16 Ohio, 324, 334.]

the policy it must be found not only that the matter was material, but also that it was intentionally and fraudulently concealed.¹ But a concealment in respect to a matter specifically inquired about in the application is fatal, although the question is not really material.² The insurers are presumed to be skilled in their business, and to know those general facts, political and otherwise, which are open to the public, and may be known to all who are interested to inquire.³ [If according to usage certain papers would be on shipboard, non-disclosure of those papers will not affect the plaintiff.⁴] In like manner the insured is presumed to know what a man of ordinary capacity ought to know, and a failure to state such facts as are clearly material in the general judgment will amount to a concealment.⁵ Such details, however, as the character and pursuits of the tenants or occupants of a building;⁶ or the character of the buildings adjoining;⁷ or that the insured had commenced the erection of a new building near those insured;⁸ or that he is personally obnoxious to the neighborhood in which he lives;⁹ or the fact of pending litigation relative to the premises;¹⁰ or how a building is heated or lighted, unless in the mode of heating or lighting there is something unusual;¹¹ or that

¹ [Alkan v. N. H. Ins. Co., 53 Wis. 136, 142.]

² [Fame Ins. Co. v. Thomas, 10 Brad. 545.]

³ Carter v. Boehm, 1 W. Black. 593; Boggs v. Amer. Ins. Co., 30 Mo. 63; Merch. & Mar. Mut. Ins. Co. v. Washington Mut. Ins. Co., 1 Hand. (Ohio) 408; Haley v. Dorchester Mut. Fire Ins. Co., 12 Gray (Mass.), 545; Pimm v. Lewis, 2 F. & F. 778; Foley v. Tabor, id. 663; Benson v. Ottawa Agr. Ins. Co., 42 U. C. (Q. B.) 282.

⁴ [Livingston v. Maryland Ins. Co., 7 Cranch, 506.]

⁵ Dennison v. Thomaston Mut. Ins. Co., 20 Me. 125. [If occupancy of the insured house by two tenants instead of one was material to the risk, it should be disclosed, otherwise it need not be, and it is a question of fact for the jury. Hardman v. Fireman's Ins. Co., 20 Fed. Rep. 594, 595.]

⁶ Lyon v. Commercial Ins. Co., 2 Rob. (La.) 266.

⁷ Satterthwaite v. Mut. Ben. Ins. Co., 14 Pa. St. 393.

⁸ Gates v. Madison County Mut. Ins. Co., 1 Seld. (N. Y.) 469.

⁹ Keith v. Globe Ins. Co., 52 Ill. 518.

¹⁰ Hill v. Lafayette Ins. Co., 2 Mich. 476; Cheek v. Col. Fire Ins. Co. (Tenn.), 4 Ins. L. J. 92.

¹¹ Girard Fire & Mar. Ins. Co. v. Stephenson, 37 Pa. St. 293; Clark v. Manufacturing Ins. Co., 8 How. (U. S.) 235.

there is other insurance,¹ — need not be disclosed unless inquired for. And even if the inquiry be whether others are interested in the property, a void tax-title need not be disclosed.² [Where carpenter work was going on in the insured building but no questions or answers were given as to it, nor was fraud or intentional concealment proved, the concealment was left to the jury, and the court refused to overrule their decision.³] Although it was said in an early case that marine, fire, and life insurance stand upon the same footing as to the application of the doctrine of concealment,⁴ there is reason for less strictness in cases of fire insurance, where the insurers are by no means so dependent upon the insured for their information, and may, and often in fact generally do, by themselves or their agents, make personal examination. Even in marine insurance, a failure to disclose the fact that there were damaged goods on board the vessel, which from their damaged condition might tend to increase the risk, was held to be no concealment.⁵ Besides, the propounding of a series of questions as to particular facts gives rise to the inference that others are not regarded as material, or that upon them the insurer has informed himself. Hence a failure to disclose many minor details obvious to any one who examines, and open to general observation, is not to be regarded as a concealment.⁶ The mere omission, without fraud, to state matter not called for by specific or general inquiry, is not concealment.⁷

¹ *Parsons v. Citizens' Ins. Co.*, 43 U. C. (Q. B.) 261; *McDonell v. Beacon Fire & Life Ins. Co.*, U. C. 7 C. P. 308. [Non-disclosure of prior assurance is not fatal unless the contract calls for such disclosure. *Agricultural Ins. Co. v. Bemiller*, 70 Md. 400.]

² *Cheek v. Columbia Fire Ins. Co. (Tenn.)*, 4 Ins. L. J. 99.

³ [*People v. Liv., Lon., & Globe Ins. Co.*, 2 T. & C. (N. Y.) 263, 271.]

⁴ *Lindeneau v. Desborough*, 8 B. & C. 586.

⁵ *Boyd v. Dubois*, 3 Camp. (Nisi Prius) 133.

⁶ *Burritt v. Saratoga County Mut. Fire Ins. Co.*, 5 Hill (N. Y.), 188; *Holmes v. Charlestown Mut. Fire Ins. Co.*, 10 Met. (Mass.) 211; *Jolly's Adm'r v. Balt. Eq. Soc.*, 2 H. & G. (Md.) 295; *Gates v. Madison County Mut. Ins. Co.*, 1 Seld. (N. Y.) 469; *Cheever v. Union Central Ins. Co.*, Supr. Ct. Cincinnati; 5 Big. Life & Acc. Ins. Cas. 453.

⁷ *Rawls v. American Mut. Life Ins. Co.*, 27 N. Y. 282; *Swift v. Mass. Mut. Life Ins. Co.*, 63 N. Y. 186; *Laidlaw v. Liverpool, &c. Ins. Co.*, 13 Grant's Ch. (U. C.) 377.

§ 208. **What Facts must be disclosed; Threats of Burning.**

—Such facts, however, as are unusual, threatening, and not open to general observation, especially if they are the inducement or occasion for the application for insurance, ought to be disclosed, whether inquired about or not. The fact that frequent threats or attempts have been made to set fire to the property for insurance upon which application is made, is such an one as would naturally attract the attention of the insurers, if known, and modify their estimate of the risk. Withholding such facts, if inquired about, would therefore amount to a concealment which would vitiate the policy.¹ And the same would be true if the inducement which leads to the procurement of insurance is the fact that attempts have been made to set fire to neighboring property so situated that, if it should burn, the property upon which insurance is sought would be endangered.² [But a failure to disclose a threat of burning made during an election excitement several months before the insurance, is not material.³] A neglect to disclose such facts, after insurance has been obtained, is not such a failure to make known any change of circumstances increasing the risk under a by-law providing that notice of such change of circumstances must

¹ *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535; *Bebee v. Hartford Mut. Ins. Co.*, 25 Conn. 51; *New York Bowery Ins. Co. v. New York Ins. Co.*, 17 Wend. (N. Y.) 359; *North American Fire Ins. Co. v. Throop*, 22 Mich. 146; *Greet v. Royal Ins. Co.*, 16 C. L. J. 275. The plaintiff answered "no" to the question, "Is there any reason to fear incendiarism, or has any threat been made?" The policy was to be void if insured omitted to state "any circumstance material." The insured had been threatened a beating, and for this reason got insured, and the policy was held to be void. *Campbell v. Victoria Mut. Ins. Co.*, U. C. (Q. B.) 17 Can. L. J. 40 (1881), Arman, J., dissenting. [The question "Is there reason to fear incendiarism, or has any threat been made?" has been held equivalent to, "Have you reason to fear, or do you fear incendiarism?" and if the applicant really feared it though without valid reason, a non-disclosure is fatal. *Campbell v. Viet. Mut. Fire Ins. Co.*, 45 U. C. R. 412, Armour, J., dis. If the insured answers all questions put to him in the blank application, he is not bound to state therein a threat "to fix him" which induces him to insure. He informed the agent of it, and this was held entirely sufficient. *Smith v. Home Ins. Co.*, 47 Hun, 30.]

² *Walden v. Louisiana Ins. Co.*, 12 La. 134; *Bufe v. Turner*, 6 Taunt. 338; *Uzielli v. Commercial, &c. Ins. Co.*, 12 L. Times N. S. 399. See also *post*, § 215.

³ [*Kelly v. Hochelaga Mut. Fire Ins. Co.*, 24 L. C. Jur. 298.]

be made under penalty of avoiding the policy if it be not done.¹ [Where the by-laws of a company are expressly made a part of the policy, and they provide that any fact subsequent to the application which would have to have been stated therein, must be stated to the company, the assured is bound to the same strictness as to such facts as he was in relation to the original ones.²]

§ 209. **General Statement sufficient, if such as Good Faith and Fair Dealing require.** — A general statement of the facts, however, sufficient to put the insurers upon inquiry if they desire more particular information, is all that is necessary.³ But if inquiry be made on this point, as the matter is within the especial knowledge of the applicant, the answer should be full, and in itself contain the information which would naturally lead to further investigation. If, therefore, in response to a specific inquiry, the applicant declares that he has no reason to believe his property in danger from incendiarism, and it appears that in fact he had, it will be no reply that he had previously talked with the agent of the company about several recent attempts made to burn buildings in town, and the risk of such fires generally, without mentioning a supposed attempt upon the building upon which the application for insurance was made. Whether such talk might, or might not, have put him on inquiry is immaterial. The truth of the answer is the only question open to the jury.⁴ It was held, however, in *McBride v. Republic Fire*

¹ *Clark v. Hamilton Mut. Ins. Co.*, 9 Gray (Mass.), 148.

² [*Calvert v. Hamilton Mut. Ins. Co.*, 1 Allen, 308, 310.]

³ *Bebee v. Hartford Mut. Ins. Co.*, 25 Conn. 51.

⁴ "When a person is particularly interrogated," said the court, in *North American Fire Insurance Company v. Throop*, 22 Mich. 146, and see *post*, § 212, "regarding a subject peculiarly within his own knowledge, and the other party is expected to contract with him in reliance upon his answer, and the answer is made misleading, if not untruthful, it seems to us alike a perversion of law and justice to say that he shall have the advantage of his uncandid answers if he can convince the jury that the other party was wanting in prudence in relying upon them, because of having extrinsic notice, which was sufficient, if followed up by inquiries in other quarters, to have led him to a knowledge of the exact facts. The insurer has a right to know the truth from the assured himself; and if his inquiries addressed to him failed to elicit the truth, it is no excuse to the latter, either in morals or law, that the insurer, if sufficiently distrustful and suspicious.

Insurance Company,¹ where there were specific threats against the particular property insured, and an answer to an inquiry upon this point was in the negative, that such an answer would not avoid the policy, unless the threats made were of such a character and from such a person that danger was reasonably to be apprehended, and such that a person of ordinary prudence and caution would regard them as worthy of notice. But mere idle talk, which by a prudent person might, and probably would, be disregarded, need not be communicated.

§ 210. **Equivocal Interrogatories; Opinions.** — Of course, if the inquiry be equivocal, or calls for an answer which involves an expression of opinion, as when the question is as to the distance of buildings within ten rods;² or what buildings endanger the one insured;³ or if there is a livery-stable in the vicinity,⁴ — whether the first question involves the necessity of specifying all the buildings within that distance, or only the nearest ones, or what buildings “endanger,” or what constitutes “vicinity,” are questions to some extent of opinion upon which intelligent men may differ, and therefore it is enough to answer them as men of ordinary intelligence should. So if the inquiry be as to whether the applicant has suffered from any derangement of certain functions, or had any “serious illness” or disease “tending to shorten life,” or any other inquiry which may be understood in different senses, as the answer to these questions

and inclined to rely upon what he had heard from others rather than upon the word of the assured himself, could be regarded as ‘put on inquiry,’ respecting the truthfulness and candor of the information, in consequence of something he had heard incidentally at a time when perhaps he had no special occasion to charge his memory with it. He goes to the authority that ought to be the best, and he has a right to rely upon what is told him. If it were allowable to submit to a jury the question of his prudence in doing so, it would be impossible for them, in most cases, to be so fully possessed of the exact condition of his information at the time as to be enabled to determine whether he was or was not guilty of negligence in such reliance.”

¹ 30 Wis. 562.

² *Gates v. Madison County Mut. Ins. Co.*, 2 Comst. (N. Y.) 43; s. c. 1 Seld. (N. Y.) 469; reversing same case in 3 Barb. (N. Y.) 73; *Masters v. Madison County Mut. Ins. Co.*, 11 id. 624.

³ *Dennison v. Thomaston Mut. Fire Ins. Co.*, 20 Me. 125.

⁴ *Haley v. Dorchester Mut. Fire Co.*, 12 Gray (Mass.), 545.

may be mere matter of opinion, an honest though erroneous answer is no misrepresentation.¹ Opinions, if honestly entertained and honestly communicated, are not misrepresentations, however erroneous they may prove to be.²

§ 211. *Same Subject.* — Upon this point the Maine case just cited is so full of sound practical sense, that it cannot be too often cited or too often perused. The only facts necessary to be added to those stated in the opinion of the court are, that to the questions, "What are the buildings occupied for that stand within four rods? how many buildings are there to the fires of which this may be in any case exposed?" there was no answer, and that the policy was to be void if any circumstance material to the risk was suppressed.³

¹ *Hogle v. Guardian Life Ins. Co.*, 6 Robt. (N. Y. Superior Ct.) 567; *Higbie v. Guardian Life Ins. Co.*, 53 N. Y. 603; *Jones v. Prov. Ins. Co.*, 3 C. B. N. s. 65. See also *ante*, §§ 175, 202; *Moulou v. Am. Life Ins. Co.*, 101 U. S. 708; *Fitch v. Am. Popular Life Ins. Co.*, 59 N. Y. 557.

² *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125. See also *Hill v. Lafayette Ins. Co.*, 2 Mich. 476; *ante*, §§ 178, 187, 202. If the applicant answers, as to what he must have known and understood, contrary to that knowledge and understanding, there can be no doubt that the law is as stated in § 201. *Barteau v. Phenix Life Ins. Co.*, 67 N. Y. 595; affirming s. c. 1 Hun (N. Y.), 430.

³ *Whitman, C. J.*, in giving the opinion, said: "The misrepresentation alleged is contained in the answer to a written interrogatory, propounded to the plaintiff, as to the distance of other buildings from the premises insured. The answer was in these words: 'East side of the block are small one-story wood-sheds, and would not endanger the buildings if they should burn.' In evidence it appeared that small sheds projected out from near the back part of the brick block of buildings (one of which was the house in question) twenty-four feet, being twelve feet in width, and eight feet stud; and leaving a passage-way in the rear of them of fourteen feet wide, adjoining some two-story wooden buildings standing on another street forty-nine feet from the plaintiff's house, and in which the fire which consumed the plaintiff's house originated. The first question which arises is, Was this a misrepresentation, or was there a suppression of the truth tantamount thereto, and material to the risk? It does not seem to be necessary in order to avail the defendants in their defence, that the misrepresentation or suppression of the truth should have been wilful. If it were but an inadvertent omission, yet if it were material to the risk, and such as the plaintiff should have known to be so, it would render the policy void. In the case at bar it has now been rendered undeniable that the burning of the two-story buildings on another street endangered the plaintiff's house; and to the interrogatory propounded it now would seem that the existence of those buildings might, with propriety, have been stated. But this does not prove that before the occurrence of the fire it would have been deemed material to name them, as being near enough to put the plaintiff's house in jeopardy. It is not an unfrequent occurrence, after a disaster has happened, that we can clearly discern that the cause which may have pro-

§ 212. **Equivocal Answer.** — An equivocal answer, however, to a question, though true in one sense, may involve a misrepresentation or concealment, all the facts being known to the applicant; as if the insured should say he had been sick a week when he had been sick two weeks, or had had a medical attendant once within a certain period when in fact he had had one on several occasions within that time, or that he was thirty years old when in fact he

deduced it would be likely to have such an effect; while, if no such disaster had occurred, we might have been very far from expecting it. In this case it is essential to determine whether the plaintiff was bound to have known that a fire, originating in the two-story wooden buildings would have endangered the burning of his house. If, as a man of ordinary capacity, he ought to have had such an apprehension, then he ought to have named those buildings in reply to the interrogatory propounded; for what a man ought to have known, he must be presumed to have known. His knowledge in a case like the present must have been something more than that, by a possibility, a fire so originating might have endangered his house. This kind of knowledge might exist in regard to a fire originating in almost any part of a city like Bangor; for a fire originating in an extreme part of it, if the wind were high and favorable for the purpose, might endanger all the buildings, however remote, standing nearly contiguous one to another to the leeward of it. Any danger like this could not have been in contemplation when the interrogatory was propounded. Such buildings only as were so nearly contiguous as to have been, in case a fire should originate therein, productive of imminent hazard to the safety of the plaintiff's dwelling could have been in view by the defendants. And the question is, Were the two-story wooden buildings of that description?

"In reference to this question, it may not be unnecessary to consider that the defendants, at the time when this policy was effected, had an agent residing in Bangor, whose business it was to attend in their behalf to the applications for insurance in that quarter. It may be believed that the selection of this individual was the result of knowledge with regard to his intelligence and capacity for such purpose. It was not, however, his business perhaps to prepare representations to be made by applicants for insurance. But it did so happen that he assisted the plaintiff in preparing the answers to the standing interrogatories before named, intended to produce a representation upon which to found the estimates of the propriety of assuming the risks proposed. He, it seems, examined the premises, looked at the wood-sheds, and the two-story wooden buildings beyond them. To him it did not seem to have occurred that the vicinity of those buildings was such as to render it necessary that the two-story wooden buildings should be named in answer to the interrogatory; for he, at the request of the plaintiff, penned the reply thereto as he thought proper.

"It does not appear that any witness has testified that, anterior to the disaster, he should have anticipated such an event as within the range of probability. What other individuals of intelligence did not foresee to be likely to occur, could not reasonably be expected of the plaintiff. And what he could not be expected to know, he cannot be considered as culpable for not knowing. And what he could not be expected to apprehend, he could not be bound to communicate; and in not communicating any such fact, he could not be considered as guilty of concealing it, even inadvertently, and much less wilfully."

was fifty.¹ And Lord Chief Justice Cockburn thought that when the insured was asked as to his occupation or profession, and answered that he was an "esquire," which in fact he was, but was also an ironmonger, he should have stated the latter fact. But the rest of the court did not agree with him.² So if at the time of insurance objection is made to the proximity of a gambling establishment, the fact that the premises upon which insurance is applied for is occupied in part by gamblers, is one which might be material.³ An equivocal or evasive answer, where all the facts are known to the applicant, so that he can answer unequivocally, is just as fatal as a false one. If not untrue, it is practically a concealment. As when one has had, and knows he has had, certain symptoms of disease inquired about, and he answers, "See surgeon's report;"⁴ or is inquired of as to the number of times he has required medical attendance, and answers, "Two years ago," when in fact he had required it at other times;⁵ or as to his age, and gives a less number of years than the true number;⁶ or as to his occupation, and having two, he states the one most favorable to himself,⁷ though on this point of occupation the Court of Exchequer Chamber seem to have sanctioned the most obvious equivocation.⁸ So if the insured equivocates as to his medical attendant; or if, having had more than one, gives the name of that one who he has reason to believe is least able to give the information sought by the insurers;⁹ or if

¹ *Cazenove v. Brit. Eq. Ass. Co.*, 6 C. B. N. s. 437; s. c. on appeal, 29 L. J. (C. P.) 160.

² *Perrins v. Mar. & Gen. Trav. Ins. Co.*, 2 E. & E. 317; *post*, § 306.

³ *Lyon v. Com. Ins. Co.*, 2 Rob. (La.) 266.

⁴ *Smith v. Aetna Life Ins. Co.*, 49 N. Y. 211.

⁵ *Cazenove v. Brit. Eq. Ass. Co.*, 6 C. B. N. s. 437.

⁶ *Ibid.*, per Pollock, *C. B. Murphy v. Harris, Batty (Irish)*, 206; *Wray v. Man. Prov. Ass. Co.*, cited by Bliss, *Ins.* 165; *post*, § 305.

⁷ *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466.

⁸ *Cazenove v. Brit. Eq. Ass. Co.*, 6 C. B. N. s. 437; *ante*, § 212; *post*, § 306.

⁹ *Morrison v. Muspratt*, 4 Bing. 60; *Hutton v. Waterloo Life Ass. Soc.*, 1 F. & F. 735; *Monk v. Union Mut. Life Ins. Co.*, 6 Robt. (N. Y. Superior Ct.) 455; *Huckman v. Fernie*, 3 Mees. & Wels. 505. And see also *Forbes v. Ed. Life Ass. Co.*, 10 Ct. of Sess. Cas. (Scotch) 451; *Abbott v. Howard, Hayes (Irish)*, 381; *Maynard v. Rhode*, 1 C. & P. 360; *North Am. Fire Ins. Co. v. Throop*, 22 Mich. 146; *ante*, § 209; *post*, § 304.

he equivocates in his answer to the inquiry whether he has applied elsewhere for insurance and been refused.¹ If the answer be rather irresponsive than equivocal, as when in answer to the question where his usual medical attendant resided, he says, "Refer to Dr. A. of B.," it seems that the insurers should inquire further, or be considered as having waived inquiry.²

§ 213. **Agent's Concealment imputable to Principal.** — Concealment or misrepresentation by an agent authorized to effect the insurance is of course concealment or misrepresentation by the principal, and carries with it the same consequences.³ An innocent principal cannot take any benefit from the fraud of his agent.⁴ The important question is whether the agent is of such a character. In effecting insurance upon the lives of third persons, reference is often made to the person whose life is to be insured, or to some other person for information, and the doctrine that such persons so referred to are to be considered as the agents of the insured in giving answers to all material questions which may be put to them respecting the matters as to which they may be properly interrogated, has apparently received the sanction of some learned judges.⁵ But in a comparatively recent case,⁶ Lord Campbell carefully reviewed the several

¹ London Ass. Soc. v. Mansel, 48 L. J. Ch. 331.

² Higgins v. Phoenix Mut. Life Ins. Co., 76 N. Y. 6; Edington v. Mut. Life Ins. Co., 67 N. Y. 185.

³ [A broker procuring insurance is the agent of the applicant, and a concealment by him avoids the policy. Hamblet v. City Ins. Co., 36 Fed. Rep. 118 (Pa.), 1888. But where A. applied to an agent B. for insurance, B. knowing the nature of the risk did not wish to put it all in his company, so he went to C., the agent of another company, who without any communication with A. or any knowledge of the property, wrote a policy and gave it to B., who delivered it to A., C's company was held bound. May v. Western Ass. Co., 27 Fed. Rep. 260 (Minn.), 1886.]

⁴ National Life Ins. Co. v. Minch, 53 N. Y. 144. See also *ante*, §§ 122, 202.

⁵ See Fitzherbert v. Mather, 1 Term R. 12; Cornfoot v. Fowke, 6 Mees. & Wels. 358; Morrison v. Muspratt, 4 Bing. 60; Maynard v. Rhodes, 5 Dowl. & Ry. 266; Lindeneau v. Desborough, 8 B. & C. 586; Everett v. Desborough, 5 Bing. 503; Huckman v. Fernie, 3 Mees. & Wels. 505; Swete v. Fairlie, 6 C. & P. 1; Rawlins v. Desborough, 2 Moo. & Rob. 328, 329.

⁶ Wheelton v. Hardisty, in the Queen's Bench, affirmed in the Exchequer Chamber, 8 El. & Bl. 232.

cases supposed to give such sanction, showing that they did not necessarily so decide, and came to the conclusion that the doctrine is unsound. And it seems now to be the settled law of England that when the insured does not expressly stipulate for the truth of the statements of third persons thus referred to, but only states his belief in their truth, fraudulent misrepresentation or concealment by them, but not known to the insured, will not avoid the policy. They are not agents in any such sense as to make him responsible for what they fraudulently state, or fail to state.¹

§ 214. **Prior or Subsequent Statements of the Person whose Life is insured as against the Party insured.** — Where one procures insurance upon the life of another, the latter having signed the application upon the truth of the answers in which the validity of the policy is made to depend, it has been held on the one hand that evidence of the declarations of the party upon whose life the insurance is effected as to the state of his health, whether made before or after the insurance is effected, if made about that time, or so near as to afford a probable inference as to the state of his health, is admissible against the insured.² But such declarations must have been made within such reasonable proximity to the time of effecting the insurance as to afford some substantial ground of inference as to the state of health at that time. One important ground, upon which such declarations are received is, that they are a part of the *res gestæ*. The subject of inquiry is the health of the person whose life is insured at the time the insurance is effected, and no one can have so perfect a knowledge of that as the person himself. Medical men always arrive at their conclusions in respect to the health by information derived in part from what their patients say; and what is said by them in respect to health under circumstances which preclude any suspicion of collusion is as fairly a part of the *res gestæ* as are symptoms

¹ See also *Rawls v. American Mut. Life Ins. Co.*, 27 N. Y. (13 Smith) 282, affirming s. c. 36 Barb. (N. Y.) 357.

² *Kelsey v. Universal Life Ins. Co.*, 35 Conn. 225; *Aveson v. Lord Kinnaird*, 6 East, 188.

learned from other sources.¹ In both of the cases just cited the statements were made prior to the consummation of the contract, and therefore, strictly speaking, what was said about the admissibility of statements subsequent thereto is extra-judicial. And so they seem to have been regarded by the court in a very recent case in Kansas,² where it was held that the declarations of a party whose life was insured for another's benefit, made long after (it does not appear by the report of the case how long) the contract was completed, cannot be received in evidence against the insured to impeach the truthfulness of the statements of the same party made in the application. The contract, it was said, is between the insured and the insurer. The parties are the same whether that which is insured is a human life or a building. There is this difference, however, that the life being active, can, by its conduct, affect the contract, even so far as to annul it, while the building, being inanimate and passive, has of itself no such power. But aside from this, the rights and liabilities of the parties to the contract are the same. The party upon whose life the insurance is effected is not a party to the record, and therefore his declarations are not admissible on that ground. He is not a party in interest, as the whole benefit inures to the insured. Neither is he the agent of the insured, authorized to speak in his behalf, nor does he come within any other rule by which his declarations can be received against the insured. And such was the doctrine in the case of *Rawls v. American Life Insurance Company*, with reference to statements made before the contract was entered into, the length of time prior to that event not being adverted to,³ and the inadmissibility being placed upon the ground that the life-insured was no party in interest to the contract, and could therefore make no statement or admission, in the absence of authority, that would divest the rights of the plaintiff, — the insured. So,

¹ *Kelsey v. Universal Life Ins. Co.*, 35 Conn. 225; *Aveson v. Lord Kinnaid*, 6 East, 188.

² *Washington Life Ins. Co. v. Haney*, 10 Kans. 525.

³ 36 Barb. (N. Y.) 357; s. c. affirmed, 27 N. Y. 282.

also, in *Fraternal Mutual Life Insurance Company v. Applegate*,¹ where a wife had insured the life of her husband for her benefit, the declarations of her husband, made after the insurance, as to the state of his health before that time, were held inadmissible for the purpose of impeaching the truthfulness of the statements made in the application, which, in this respect differing from the cases which we have just been considering, was signed by the beneficiary thus: "Henrietta Applegate, by H. S. Applegate," the husband. The statements in question were regarded by the court as those of a stranger who was neither a party to the suit, nor, at the time when they were made, acting as the agent of the insured. They were not the declarations of a sick person in relation to his condition at the time of making them, but related to transactions and a state of facts long past. They were not admissions against interest, for they could only affect injuriously his wife's separate property. They were not the statements of one who had been a witness on the trial offered to impeach his testimony. And although they were the declarations of the person who best knew the facts, this would only go to their weight, when their competency had been established.²

¹ 7 Ohio St. 292.

² And see also *Stobart v. Dryden*, 1 Mees. & Wels. 615, from which it is to be inferred that *Aveson v. Lord Kinnaird* is not an authority save upon its exact facts. In fact, this case and the case of *Kelsey v. Universal Life Ins. Co.*, *ubi sup.*, seemed to have carried the principles upon which they proceed — a quasi right of cross-examination, and the doctrine that the declarations are part of an act, and so part of the *res gestæ* — to an extreme, if not to an untenable limit. Indeed, it must now be considered that the declarations of a person whose life is insured for the benefit of another, made after the insurance, and by the weight of authority those made before, are inadmissible as against the beneficiary, for the purpose of proving fraud, whereby the policy may be avoided. *Mobile Life Ins. Co. v. Morris* (Tenn.), 10 Ins. L. J. 35; *Southern Life Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606; *Westropp v. Bruce*, Batty, 155; *Union Central Ins. Co. v. Cheever* (Ohio), 10 Ins. L. J. 104; *Grangers' Life, &c. Ins. Co. v. Brown* (Miss.), 10 Ins. L. J. 187; *Cahen v. Continental Life Ins. Co.*, 69 N. Y. 300. *Swift v. Mass. Mut. Life Ins. Co.*, 63 N. Y. 186, holds that declarations of such a person made before the insurance are admissible. In that case, referring to the cases from the 6th of East and the 35th of Connecticut, Folger, J., says:—

"The soundness of these decisions has been called in question. See *Mulliner v. Guard. Mut. Life Ins. Co.*, 1 N. Y. Supr. Ct. 448; *Wash. Life Ins. Co. v. Haney*, 10 Kans. 525; *The Frat. Mut. Life Ins. Co. v. Applegate*, 7 Ohio St.

§ 215. **Special Facts deemed material to be disclosed.** — Whether the fact that the insured was in prison at the

292. In the latter case it is said that *Aveson v. Kinnaird*, *supra*, has not been acquiesced in, and that the contrary doctrine is held in *Stobart v. Dryden*, 1 M. & W. 615. I think that *Stobart v. Dryden* does not profess to overrule *Aveson v. Kinnaird*, or to establish that the conclusion there arrived at, upon the question there involved, was not correct, though the reasoning indulged in and the authorities cited there are criticised. Nor have I been able to discover where any court has held that the declarations of one whose life has been insured for the benefit of another, made as to his state of health, and made at a time prior to and not remote from his examination by the surgeon of the insurers, and in connection with facts or acts exhibiting his state of health, have been rejected from the evidence, where the issue was as to his knowledge of his own bodily state at that time. There are decisions that declarations made after the contract of insurance has been effected may not be put in evidence. But they are put upon the intelligent reason, that after the contract of insurance has been effected, the subject of insurance has no such relation to the holder of the policy as gives him power to destroy or affect it by unsworn statements. 10 Kans. *supra*; 7 Ohio St. *supra*; *Mulliner v. Guard. Life Ins. Co.*, *supra*; *Rawls v. Mut. Life Ins. Co.*, 27 N. Y. 282. And in some cases it is said that such declarations in relation to acts and facts, made prior to the issuing of the policy, are not a part of the *res gestæ* of those acts and facts. But the remark did not grow out of the facts of the case. It is sometimes asserted that the case last cited, and the same case in the court below, 36 Barb. 357, do hold that prior statements are inadmissible. See *Bliss on Life Ins.*, § 372; 1 Big. Life & Acc. Ins. Cas. 549, 558. But it does not appear from the statements of the case in *Barbour and Smith* (27 N. Y.), that the declarations offered were prior to the issuing of the policy; and it does from the statement in *Smith* that they were subsequent, and so they are shown to have been by a reference to the case and points deposited in the State library. It is true that the opinion of the learned judge given in *Barbour* condemns the introduction in evidence of prior declarations. But as it does not appear that any such were offered, the remark was *obiter*; and as it does not appear that they were offered as having been made in connection with his prior acts, to show the knowledge of the insured at the time of his medical examination, the remark is still less applicable to the question we have in hand. We must conclude that there is no decisive authority against the admission of prior declarations accompanying acts to show knowledge, while there is some for it. Upon the principle of the matter, we hold that when made at a time not too long before the application and examination, and when a part of the *res gestæ* of some act or fact exhibiting a condition of health which they legitimately tend to explain, they are admissible to show knowledge in the subject of the insurance of his physical condition. Statements made by a person while disclosing a wound or a sore, as to the cause or nature of it, are evidence not much weaker than the existence of the wound or sore, of his knowledge of his bodily state. The latter prove that he knew that he was ailing, and no one denies that the proof of them is admissible to show that he was, and that he knew it; the former tend to prove with more or less certainty, as the cause and character of the ailment are more or less in the common and unskilled knowledge of men, that the cause and character of it are known to him.

“The taker of a life policy from insurers, when he asks payment after the death, is liable to an inquiry into the previous life and condition of the subject insured at the time of the application for the insurance, or at a prior time, not

stated place of residence was material should be submitted to the jury.¹ So, too, the fact that he had been insane twenty years before, if to the applicant's own mind it was material.² So a misstatement as to his pecuniary condition and relations may be material, if made to the medical examiner, whose decision upon the quality of the risk might be influenced by the fact that the applicant had the means to take proper care of himself,³ but not a misstatement which amounts only to an opinion as to whether there has been any derangement of certain functions, or whether he has had any "serious illness."⁴ And in a case reported by Ellis, it seems to have been assumed that a concealment of the fact that the insured, a single woman, had, a year or two before, had a child, was material. So the physician was permitted to testify. But there was another good ground of defence, and the case upon this point cannot be entitled to much weight.⁵ And it seems that pregnancy,

remote therefrom. All facts may be proven which tend to show that condition, because he has a legal relation to them, and they legitimately affect his right to the contract which he has got. As he presents the subject of insurance to the insurers as one who for him may make answer to their material inquiries, and as one who to the extent of his knowledge will make answers thereto truthfully, he has a legal relation to the subject of insurance, and is bound by his answers of material facts, and is affected by his knowledge and his answering according thereto, or variant therefrom. Hence it is that any prior fact or act not too remote is proof against the policy-holder of knowledge concealed by the subject of the insurance. Hence it is, too, that any statement which is part of the *res gestæ* of such prior fact or act tending to characterize and explain it, is also proof thereof, though unsworn to.

"Facts occurring after the insurance has been effected may be evidence, inasmuch as all facts which are material are competent to be proven. But the subsequent statements of the subject of insurance, not connected with a contemporary act or fact, are then but hearsay, for in such case the policy-holder has no such legal relation to the subject as that the latter may affect him by his unsworn declarations; and the declarations have no such connection with any prior act or fact as to be a part of the *res gestæ* thereof." But this case is in turn criticized and denied in *Hurd v. Missouri, &c. Society* (Supr. Ct. Indianapolis), 6 Ins. L. J. 799. See also *Wilson v. Life Association, C. Ct. (Mo.)*, 6 Ins. L. J. 240.

¹ *Huguenin v. Rayley*, 6 Taunt. 186.

² *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52.

³ *Valton v. Nat. Loan Fund Ass. Soc.*, 1 Keyes (N. Y.), 21, reversing s. c. 17 Abb. (N. Y.) Pr. Cas. 278.

⁴ *Hogle v. Guardian Life Ins. Co.*, 6 Robt. (N. Y.) 567. And see *post*, § 296.

⁵ *Edwards v. Barrow, Ellis, Ins.* 116.

though not inquired about, may be a material fact to communicate.¹ As the right of lien is vital to the existence of mutual insurance companies, an omission to state an incumbrance, especially if inquired about and answers in the application are agreed to be true and full, is conclusively material as matter of law.² Otherwise in stock companies, if not inquired about.³ And a false answer to an inquiry about prior applications is fatal.⁴

[§ 215 A. A warehouse erected within forty-one feet of a factory increases the risk, and if not disclosed when asking for a renewal, a policy issued in renewal will be void.⁵ In a diagram of the insured premises, a failure to state that a contiguous building contained benzine was held a material concealment under the terms of the policy prohibiting benzine, and avoided it. The company could not be presumed to know that benzine was necessary in the manufacture of barrels.⁶ Where the assured had released the railroad company from liability for fires that might be caused by the engines, but did not mention this fact to the insurer, it was a question for the jury whether such concealment was material, in determining which they might consider whether the insurer was in the habit of making any different rates in reference to the existence or non-existence of the right of subrogation.⁷ If we are to take the analogy of marine insurance the case is clear, for marine insurers habitually charge a higher premium where the recourse against the carrier is limited or denied, and the plaintiffs knowing this must disclose an arrangement by which the carrier was to be responsible only for negligence.⁸ It is just that the company should know about a release of the carrier, and if the concealment is intentional there could be no question of

¹ *Lefavour v. Insurance Co.*, 1 Phila. 558.

² *Bowditch Mut. Fire Ins. Co. v. Winslow*, 3 Gray (Mass.), 415.

³ *Delahay v. Memphis Ins. Co.*, 8 Humph. (Tenn.) 684.

⁴ *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564. [See § 188 C.]

⁵ [*Peoria Sugar Ref. Co. v. People's Fire Ins. Co.*, 52 Conn. 581.]

⁶ [*McFarland v. Peabody Ins. Co.*, 6 W. Va. 425, 435.]

⁷ [*Pelzer, &c. Co. v. St. Paul Fire & Mar. Ins. Co.* (S. C.), 1890.]

⁸ [*Tate v. Hyslop*, 15 Q. B. D. 368.]

the propriety of holding the company released, but if merely inadvertent it seems scarcely proper in the absence of inquiry or usage to require a statement so unlikely to appear relevant to any but those who understand the law of subrogation. Concealment of the probable loss of a vessel at the time of insurance is fatal.¹ A concealment of material facts *which the insurer is not bound to know* avoids the policy,² and though ruinous, they must be disclosed.³

§ 215 B. **Facts deemed immaterial.** — On the other hand, it has been held that the failure to mention that the applicant is insolvent, and that there are judgments against him which constitute a lien upon his property, is not a concealment.⁴ So, it seems, of a failure to state that the insurer's agent had declined a risk in the same block, the matter not having been inquired about. The declination might be for a reason showing that it was quite immaterial, for instance, that the insurers had already a risk in the particular block to the full extent permitted by their rules; or it might be for a reason showing that it was to some extent material, as, for instance, that the risk was a specially hazardous one. Still the principal is presumed to know what the agent knows, and there can be no concealment of a fact known to the insurers.⁵ So a Northern man living in a Southern community was not bound to state that the people were hostile to him, or that the forces who had possession of the neighborhood and guarded the property sometimes smoked pipes and had fires in the vicinity. All this the insurers were presumed to know might be the case, from the known fact of the existence of hostilities.⁶ In France, where the fact undisclosed does not amount to a concealment which avoids the policy, but nevertheless relates to a fact which if

¹ [Hart v. British, &c. Ins. Co., 80 Cal. 440.]

² [Vale v. Phoenix Ins. Co., 1 Wash. 282, 284.]

³ [Durrell v. Bederly, Holt N. P. 283, 286.]

⁴ City Fire Ins. Co. v. Carrugi, 41 Ga. 660; Delahay v. Memphis Ins. Co., *supra*.

⁵ Lightbody v. North Am. Ins. Co., 23 Wend. (N. Y.) 18; Goodwin v. Lancashire Ins. Co., 18 C. L. J. (Q. B.) 1.

⁶ Keith v. Globe Ins. Co., 52 Ill. 518.

known would have required, by the rules of the company, a higher rate of premium, the insurers are allowed to deduct from the loss the difference between the premium actually paid and that which would have been required if the fact had been known.¹ An agreement between the mortgagee and mortgagor, that the latter shall pay the premium upon an insurance in the name of the latter, is not a fact material to be disclosed.² Nor need the not unusual mode of use or manner of heating or lighting the property insured be stated, unless inquired for.³

[§ 215 C. A brick oven is not as matter of law so unusual or material that its concealment is fraudulent.⁴ The concealment of the fact that the master who runs the insured ship owns one-half interest in her, is not a material one which would avoid the policy.⁵ The assured are only bound to communicate *facts*, not sensations and apprehensions.⁶ Nor need there be disclosure of anything with respect to a fact in regard to which there is an express or implied warranty.⁷]

[§ 215 D. **Ordinary Diligence** in communicating facts is all that is necessary. Knowledge coming to the insured pending negotiations for a policy must with due and ordinary diligence be transmitted to the company.⁸ But an omission to send material information to the underwriters by an *unusual* way which would have caused it to reach them before the policy was effected will not vitiate the same, though by sending it by an ordinary route, it did not reach them before the issuing of the policy.⁹]

¹ Ass. *Terrestris c. Hoffman*, Dalloz, Jur. Gén. 1845, 1823.

² *Kernochan v. N. Y. Bowery Ins. Co.*, 17 N. Y. 428, reversing s. c. 5 Duer (N. Y. Superior Ct.), 1.

³ *Girard Fire & Mar. Ins. Co. v. Stephenson*, 37 Pa. St. 293; *Clark v. Manuf. Ins. Co.*, 8 How. (U. S.) 235; *Boggs v. American Ins. Co.*, 30 Mo. 63; *Barralou v. Royal Ins. Co.*, 15 L. C. 3; *ante*, § 208; *post*, § 245, *sub finem*.

⁴ [*Richards v. Washington Fire & Mar. Ins. Co.*, 60 Mich. 420.]

⁵ [*Russ v. Waldo Mut. Ins. Co.*, 52 Me. 187, 190.]

⁶ [*Bell v. Bell*, 2 Camp. 475, 479.]

⁷ [*DeWolf v. N. Y. Firemen's Ins. Co.*, 20 Johns. 214, 229.]

⁸ [*M'Lanahan v. Universal Ins. Co.*, 1 Pet. 170, 185.]

⁹ [*Green v. Merchants' Ins. Co.*, 10 Pick. 402, 407.]

CHAPTER XI.

SPECIAL PROVISIONS OF THE CONTRACT, INCREASE OF RISK, ALTERATION, USE, VACANCY, WATCHMAN, WORKING OF MILLS, CARE OF BOOKS, ETC.

STANDARD CONDITIONS IN CANADA AND MASSACHUSETTS.

ANALYSIS.

1. GENERAL.

§ 216. Breach of condition renders the contract voidable not void (§§ 216, 365). If no time is specified a reasonable time is intended ; see also § 225.

§ 217. Two classes of stipulations, those relating to matters prior to loss and determining the risk, and those relating to matters arising after the loss, and relating to its establishment, adjustment, and recovery.
courts are strict in dealing with the former, they are cautious about fixing the liability of the insurer (so it is said, though some may fail to see it), but once fixed they are reluctant to let the insured lose his indemnity for lack of a formality.

2. INCREASE OF RISK.

§ 218. There is usually a provision against increase of risk, and there is always an implied promise not to increase it by changes beyond what good faith would sanction interpreted in the light of custom. The question of increase is for the jury even where expert testimony is uncontradicted.

Any hazardous use, whether among those enumerated in the policy or not, avoids it, under the general stipulation against increase of risk.

A mere *intent* to violate a condition, however, is not fatal, though steps have been taken toward its execution, § 218 ; see § 236.

Sometimes the policy provides that it shall only be suspended during the increase ; see also § 245.

A reinsurer is liberated by increase of risk, though the insurer consent to it.

Increase between application and issue of policy fatal.

§§ 219, 220. *Such slight variations* of risk as are incident to the ordinary uses of the property are not fatal, § 219.

otherwise with the erection of an oven, new buildings, or machinery, moving a steam engine, &c., § 220.

It is immaterial under the usual clause *whether the loss was caused by the increase or not*, § 220.

- § 220. If the insured has two policies from the same office, a permission to increase the risk under one policy saves the other.
- § 221. *Notice to and assent* by the insurer ; see also §§ 222-225.
both must be within a reasonable time.
no notice necessary of a change not increasing the risk.
agent may waive written assent, § 221.
ordinary diligence in giving notice is sufficient ; see § 215 D.

3. ALTERATION, &C.

- §§ 222-226. An alteration may or may not be material, *e. g.* the substitution of slate for shingles would not increase the risk (§ 222), while adding a story to a house would, § 257.
- Property removed ceases to be insured until replaced (§ 222 ; see also § 188 A), unless the change is so slight as to be unimportant, as from first floor to basement (§ 222). In the absence of express stipulation the materiality of an alteration depends on the question whether it would have raised the rate of premium (§ 223 ; see also § 261).
- Repairs* necessary to the use of the property, and acts of ordinary ownership such as are sanctioned by usage do not violate the condition against alteration or increase of risk, § 224.
- The materiality of an alteration may be taken out of the region of debate by agreement of the parties that a given change shall be fatal, § 223.
- Substantial fulfilment of the warranty* sufficient, § 223.
- The opening of a new door, making a new closet, putting in a brick floor, or an iron grate, changes the identity of the property, *changes the risk* but does not materially *increase* the risk. Not to allow such common and trivial alterations would be an irrational construction. § 224.
- § 225. If the enlargement or other change be within the limits of honest dealing the insured is not prejudiced, though the loss was actually due to the alteration. (See also § 230.) Permission to make necessary alterations and repairs does not sanction a large addition.
- § 226. If part of the change increases and another part decreases risk the jury may strike the balance.
- § 227. A material alteration by a tenant or agent without knowledge of the insured is fatal unless the terms of the policy otherwise express, as where the increase is to be by "means within the control of the assured."
- § 228. "Premises" means building ; see also, §§ 239 B, 243.
- § 229. "Alteration at risk of insured."
- § 231. A statement of present use not a warranty of its continuance. (See also, §§ 247, 248, 250-252, 157, 191.) An *enlarged* use for a permitted purpose does not avoid.

4. CLASSIFICATION OF RISKS.

- § 232. Goods are often classified into hazardous, extra-hazardous, memorandum articles not insurable at all or only on special conditions, &c., and a policy insuring one class will be avoided if a more hazardous class is kept in stock or mixed with the

stock insured. To hold otherwise would compel an insurer to bear a loss for a *lower premium* than that for which he would *knowingly* have assumed the risk.

where there is no bad faith, however, a rule similar to that spoken of in § 215 B, as prevailing in France, might be applied with advantage.

- § 233. If however the policy describes the stock insured as such as is "usually kept in a country store," the scope of the policy is thereby enlarged to cover any article in the non-insured classes; if they are "usually kept," §§ 233, 239.
- such is the general current of authority, though there are cases which hold that the clauses of exclusion are paramount, and govern the general description of the stock, § 233; and see § 238.
- in most of these cases it will be found that the policy expressly stated that the clause of exclusion should operate upon the prohibited articles unless they were specially provided for, or that mere general terms should not overcome the prohibition.
- "*goods usually kept in a country store*," § 233, n.
- may include benzine, saltpetre, gunpowder, &c.
- "*stock of groceries*" includes saltpetre, § 233, n.
- "*stock of confectionery store*" includes fireworks, but groceries, liquors, and tobacco does not, § 233.
- but if a special clause allows a reasonable quantity, *more* will be fatal, in spite of usage, § 233, n.
- if the "usually kept" clause is followed by "*except as hereinafter provided*, the" printed conditions govern, § 233, n.
- § 234. But a permissive clause is strictly construed, whether express or implied, *e. g.*, though gunpowder or kerosene may be kept for sale, they cannot be manufactured or kept for other purposes than sale; see also § 239.
- § 235. Hazardous goods are those which increase the risk of fire.
- § 236. Hazardous trades. By reason of the context a permission of "extra-hazardous" construed to permit "specially hazardous" trades.
- § 237. An *additional* use of the same grade of hazard as those permitted avoids the policy (as putting in one more stove, see § 220, n.). An accumulation of hazards increases the risk. Making excelsior in a spool factory fatal, though not as hazardous as the business insured.
- § 239. Where a stock of goods or property used in business, &c., is described as insured, without qualification, this written description controls inconsistent printed conditions (see also § 233 and general rule, § 177); *e. g.*, the insurance of a "printing business" in which camphene is in customary and necessary use, is not avoided by a clause excluding liability for loss by camphene, though the loss actually occurred by dropping a match into a pan of that fluid. All that is properly incidental to the business insured is also insured.

§ 239 A. Gasoline, petroleum, &c.
 under a policy on a factory prohibiting petroleum it may be used as a lubricator, if such is the custom.
 "only sperm-oil and lard as lubricator" not broken by using petroleum mixture if as good and safe.
 "lamps to be filled by daylight."
 "kerosene allowed for light in *dwelling*," clerk sleeping in store will not make it a "dwelling."
 court not judicially notice that gin and turpentine are inflammable.

§ 239 B. Gunpowder, fireworks, nitro-glycerine, &c.
 "75 lbs. allowed," mere casual presence of more not fatal, it not appearing to have caused the loss.
 policy on goods, to be void if powder kept on "premises insured," not void for powder in buildings not insured, though insured goods are there. Premises means real estate; see also § 228.
 prohibition of gunpowder does not keep out fireworks.
 "Yankee notions" covers fireworks, "groceries, liquors, and tobacco" does not.

5.

§ 240. The hiring of carpenters to make constantly needed repairs does not avoid a policy, though the working of carpenters is stated in the printed conditions to be fatal; otherwise with extensive alterations.

§ 241. "Use," "keeping," &c., when stipulated against, mean *habitual* use, keeping, &c. The condition is not violated by casual use. But a single use, if it is the cause of loss, is fatal (note).

§ 242. "Storing" means keeping to redeliver as received; keeping a quantity to replenish stock is not storing, nor keeping for sale. If company knows premises may be used to store cotton and provides for additional premium, the storing is not fatal.

§ 243. "Keeping." "Premises" means real estate.

§ 244. Change in surrounding circumstances. *Good faith* is a part of every contract, and if an act in violation of good faith causes loss there can be no recovery, although no express stipulation of the policy covers the act. An act in bad faith, however, which does not cause loss, is without effect on the policy. change of use from that described is not necessarily fatal. If it does not materially increase the risk, only express provision against change can make it fatal.

§ 245. Suspension of policy follows *temporary* increase of risk (see also § 222). If, however, by the terms of the policy the *introduction* of a steam-engine avoids it, such introduction will be fatal though the engine is removed before the fire. The contrary has however been held even where the policy was to be "immediately void." A *habit* of breaking conditions is of no consequence if there is none at the time of loss. Smoking, bar-room, bawdy-house, bowling-alley, after expiration of license (note).

§ 246. "Unlawful use" not a single misdemeanor, or a casual use. There must be a use substantial in its continuance, and attachment to the premises.

- that A, whose life is insured by B, goes on an illegal voyage without B's knowledge is immaterial, there being no prohibition in the policy.
- § 246 A. Knowledge by president of addition made under verbal assent estops company.
- If company knew buildings have been or are to be used as exhibition buildings, it cannot object to such use or any of its incidents.
- Parol admissible to show agent's knowledge of increase of risk ; permission to keep kerosene, left out of policy by mistake, &c.
- If agent of insured to renew knows of increase of risk failure to disclose is fatal.

6.

§§ 247-249 J. Occupancy :

- In absence of express provision on the subject of vacancy, description of premises as a "dwelling" or as occupied by a particular person, no warranty against vacancy, § 247.
- representation of present status not an agreement for its continuance, § 247.
- change of tenants immaterial, § 247.
- "to be occupied by a tenant" is only an expression of expectation, § 248.
- unless the time is fixed within which the house is to become occupied, § 248.
- temporary vacancy between tenants is not fatal, § 249 B.
- nor on a visit ; see §§ 248, 249 D.
- nor stoppage of mill for repairs, &c., § 248.
- nor even complete, permanent vacancy, unless in bad faith or such as to increase the risk materially, §§ 248, 249 B.
- An express provision against vacancy is necessary, §§ 247, 248, 249 B.
- unless the premises are purposely left vacant in bad faith, § 248.
- or the vacancy is of such character as to come under the increase of risk clause, § 248.
- ordinarily it is not an increase of risk, § 249 B.
- but if a house is left by the owner and an intruder opens a saloon, the risk will be increased, not by the vacancy, but by what happened in consequence, § 249 B.
- an oral promise insufficient, § 248.
- If there is no "vacancy clause," good faith and the "increase of risk provision" are the tests, §§ 247-249 B.
- if there is a vacancy clause, its special words, if not too unreasonable to be sustained (§ 249 G.), must be added to the tests, §§ 247-249 B.
- vacant means empty of all but air, § 249 A.
- unoccupied means no one in actual use or possession, § 249 A.
- terms must be construed with reference to the subject-matter, § 249 A.

the condition in a policy on a hog house refers to the human occupation of the dwelling on the premises, not to the hogs, § 249 A.

requires practical use, § 249 (shop) ; but see § 249 D (grain-elevators).

requires use as a customary place of abode, § 249 A (dwelling).
not uninterruptedly, but the place of habitual return and stoppage, § 248, n.

leaving in charge of one living near, not sufficient, § 249 A.
purpose to move into a house though partly executed is not enough, §§ 249 A, 249 C ; but see § 249 D.

occupation of the *land* is not enough, the *house* must be occupied, § 249 C.

the condition applies to all the buildings on the premises, § 249 A.

it is distributive, § 249 A.

diligence of the insured does not enter the question unless so agreed, as by the words "vacancy within assured's control," § 249 F.

then insured must show it was beyond control, § 249 F.

in general, removal by tenant, though before lease is out and without knowledge of assured, is fatal, § 249 F.

false answer as to occupancy fatal, § 249 G.

policy once voided for vacancy not revived by reoccupation, § 249 G.

unreasonable condition, which would avoid the policy if the premises were used or not, is void, § 249 G.

by-law as to, subsequent to policy, no effect, § 249 G.

Maine statute, § 249 G.

Vacancy may be waived :

expressly by writing, § 249 H.

or orally even though the policy requires writing, § 249 H.

or declares that no agent can waive, § 249 J.

a general agent may waive this last requirement as well as the other, §§ 249 H, 249 J.

impliedly by knowledge of the agent.

state of premises as to occupancy at time of insurance.

if occupation at loss is same as known to agent at time of insurance, company estopped, § 249 I.

although the applicant ignorantly signed an erroneous application filled up by the agent, § 249 I.

but if house once becomes occupied after insurance the condition takes effect, § 249 I.

vacancy occurring after insurance :

if agent tells assured it will be fatal, no waiver, § 249 I.

so if he is merely silent, § 249 I.

knowing that vacancy is likely to occur in future, no waiver, § 249 I. Tenement, summer-house, &c.

general agent may modify contract so as to cover future vacancies, § 249 H.

if the policy says unoccupied buildings must be insured as such, they must be, § 248.

no implied obligation to keep a watch in a vacant house, § 248.

mere going out of one tenant is not a "change of tenants" till new one comes in, § 249.

a vacancy is not an "alteration of use," § 249.

What is a vacancy :

vessel left alone, § 249 C.

moving in just begun, §§ 249 C, 249 A ; but see § 249 D.

leaving a few articles in house, and non-delivery of key to owner not sufficient, § 249 C.

nor supervision by one not living in house, §§ 249 A, 249 C.

What is not a vacancy :

absence on a visit, § 248.

or a funeral, § 249 D.

leaving summer-house in winter, § 248 ; see however, § 249 I.

temporary suspension of a mill, § 248.

for repairs, or because of low water, § 248.

casual absence on night of fire, § 249 D.

moving in nearly complete, § 249 D.

sleeping in adjoining house not fatal, § 249 D.

if any one of the "family" remains it is sufficient, § 249 D.

or if part of a tenement house is occupied, § 249 D.

grain elevator not vacant if owner keeps his papers there and is in and out, § 249 D.

Notice of vacancy :

must be given if required by the policy, § 248.

Temporary vacancy between tenants not fatal as an increase of risk, § 249 B.

but is under the vacancy clause, § 249 B.

even though the fire was smouldering unnoted before the tenant left, § 249 B.

"Vacant and so remain :"

means vacant until loss, § 249 E.

agent's knowledge of vacancy at time of consenting to transfer does not waive the condition as to *remaining*, § 249 E.

7.

§§ 250-252. *Watchman*. No implied obligation to keep watch in a vacant house, § 248. Statement that a watch is kept, sometimes held a warranty ; contrary to the general rule that the courts will not find warranties where the parties have not clearly made them, on the ground of the great importance of the watch being continued. The true ground and the one that

harmonizes many of the cases, is that a change *beyond the limits of good faith* will be fatal, and where the question as to the present state of things refers to a matter the continuance of which is of *much importance*, so that the question is manifestly intended to discover the nature of the risk the company has to take, the insured must be held to know that such was the purpose, and conform to it (§ 250); a provision not to increase the risk turns representations into warranties that the present state shall not be substantially changed for the worse (§ 218); there is good authority that the condition not to increase the risk substantially is an *implied* condition in every contract of insurance (§ 218); so the logic of the case seems clearly in favor of the view taken here and in § 157; see § 244.

absence of watch at meals, § 251.

one who sleeps not a "watchman," § 252.

warranty of "watchman on premises" is fulfilled if he is on adjoining premises in better position to watch than if in the mill, § 252.

- § 253. Working of mills, hours of running. "Constantly worked" means during ordinary hours. "Worked by day," no breach if engine works at night.
stoppage for repairs.
- § 253 A. Condition against ceasing operations not broken by stop because of epidemic, or permitted repairs, nor by suspension of *part* of the business, unless the condition expressly and undoubtedly includes such stoppage.
- § 253 B. Agent's knowledge before issue of policy that a factory or distillery is run at night, &c., estops the company to set up the condition against such running. (*Contra*, Massachusetts, and probably some other States; see § 145 *et seq.*)
but agent's knowledge of, or even company's verbal assent to, an *intention* to do an act in the future, will not estop it.
- § 254. "Mill examined after work." At what time work ceases question for jury.
- § 255. Warning; care of stoves; ashes to be put on brick not wood; iron shutters.
- § 256. Misdescription of ownership or of the property or its occupancy, will not in general avoid the policy unless so expressly stipulated.
clerk slept in store, mere representation not warranty.
- § 257. "Filled in with brick" held a warranty; (see effect of usage, § 261).
two-story house changed to a three-story after application and before issue of policy, fatal alteration.
- § 258. Omission of outbuildings (see also § 260). Distance of buildings "contiguous." Diagrams.
- § 259. "How bounded;" "situation;" distance of other houses.
- §§ 260-262. If the description is on its face imperfect (§ 260), or if the company or its agents in any way know of the imperfection (§ 262), the company cannot set up the fault. See ch. vii. anal. 4, §§ 207, 197.

8.

- § 263. Misrepresentation of relationship to the life-subject fatal.
- § 263 A. Covenant to keep books in safe at night means after business hours.
adjuster may waive the covenant.
Agreement to keep stock up, failure not fatal if stock gets below the insurance, for the company is benefited.
Agreement not to question application after death excludes evidence of fraud, or misrepresentation.
Policy to be void if building falls, no void by part falling.
- § 263 B. *Substantial* compliance with conditions is sufficient.
Company estopped if performance is prevented by itself.
Failure of collateral agreement to give company all his insurance, not fatal unless so expressed.
Condition valid though ill worded.
- § 263 C. No expert evidence as to matter of common experience.
Custom will not determine question of increase of risk.
Burden of proving breach is on company.
- § 263 D. In Canada standard conditions are fixed by statute.
- § 263 E. The Massachusetts Public Statutes provide a very good standard policy. Such statute conditions may however be varied by the parties.

§ 216. **General Observations; Effect of Breach of Condition; Presumption of Knowledge of Condition; Notice.** — In proceeding to consider the scope and effect of the various conditions and stipulations in which the modern contract of insurance abounds, it is of the first importance to determine whether they are in the nature of warranties or representations, and if so, whether they are affirmative or promissory, and also whether they are themselves controlled by accessory stipulations as to their truth, fulness, and materiality. Some policies, as we have seen, seek to make all the statements in the application warranties by making them by express stipulation a part of the contract, while others stipulate that they are to be referred to for a limited purpose only, as for the purpose of description and identification, or stipulate for the truth of all facts stated, or for their truth only so far as risk or value is concerned, or so far as is known to the insured, or they are material to the risk, or are inquired for, or for their truth in all these respects; or refer to the statements in the application, which by reference is made part of the contract, as representations, or as to be used and resorted to, to explain the rights and obligations of the parties. Much depends upon the proper solu-

tion of these preliminary questions, as will be seen by a perusal of the preceding chapters, in which we have endeavored to state some of the general principles applicable thereto. Bearing these in mind, we shall be better able to arrive at satisfactory conclusions upon the many perplexing questions which will arise, and, guided by their light, we shall find that many decisions, apparently contradictory and irreconcilable, are not so in fact, but stand well upon the special circumstances of the case and the special stipulations of the contract under consideration.

It is well, also, to bear in mind that a breach of condition, of whatever character, does not necessarily avoid the policy; it merely renders it voidable, at the option of the insurers.¹

The presumption is that the conditions of the contract are known to both the parties thereto, but the presumption is not conclusive. It may be shown that such was not the fact.²

Where, by the conditions of the policy, notice of any particular fact is to be given the insurers, as that the house insured has become vacant, no time being specified, on pain of forfeiture, the more sound and sensible rule is, that if the notice be given within reasonable time, whether it be before or after the loss, the condition will be complied with. Though it has sometimes been said that the notice must be given before the loss, at the peril of the insured if he fail. The condition being to give notice, if this be done within reasonable time, it is difficult to see where or how there is any breach.³

§ 217. **Two Classes of Stipulations.** — There are two general classes of these stipulations which it is well to notice;

¹ [Turner v. Meridan Ins. Co., 16 Fed. Rep. 454, 457]; *post*, § 365.

² Bissell v. Am. Fire Ins. Co., 2 Hughes, C. Ct. 531; Keller v. Equitable Fire Ins. Co., 28 Ind. 171; Geib v. International Ins. Co., 1 Dill. C. Ct. 443, 449; Chatillon v. Canadian Mut. Fire Ins. Co., 27 U. C. (C. P.) 450; Cheever v. Union Central Ins. Co., Superior Ct. Cincinnati, 5 Big. Life & Acc. Ins. Cas. 458.

³ Canada Landed Credit Co. v. Canada Agr. Ins. Co., 17 Grant, Ch. (U. C.) 418; *post*, §§ 221, 225.

first, those relating to matters and things prior to the loss, and having for their general object to define and determine the limits of the risk; and, second, those which relate to matters and things occurring after the loss, and having for their object to define and determine the mode in which an accrued loss is to be established, adjusted, and recovered. The former pertain more especially to the circumstances which affect the risk, such as the character, habits, mode of life, use, occupation, alteration, alienation, title, location, and the like, of the persons, property, or premises insured, and constitute, so to speak, the substance of the contract; while the latter pertain more especially to those formal acts and circumstances which, when reciprocal rights and liabilities have become fixed by the terms of the contract, are supplementary thereto, and necessary to make it productive to the insured of the benefit sought thereby. As to the former, relatively speaking, there is more strictness in holding parties to the terms of the contract, and less readiness to find in the circumstances a waiver of their respective rights. In other words, the courts will proceed with caution in determining the question of the liability of the insurer; but when this liability is fixed by the capital fact of a loss within the range of their responsibility, they will be very reluctant to deprive the insured of the benefit of that liability, by any failure or neglect to comply with the mere formal requisitions of the contract, by which his right is to be made available for his indemnification.¹

§ 218. **Increase of Risk generally.** — [In every contract of insurance there is an *implied* agreement not to increase the risk, whether anything is said upon the subject or not.² If the insured could increase the risk he could change the contract, which one party to an agreement can never do. There is, however, almost always an express provision on the subject. Where a policy insured a certain house from Feb. 1, 1851, to Feb. 1, 1857, on an application signed October,

¹ *Hinman v. Hartford Fire Ins. Co.*, 36 Wis. 159; *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102.

² [*Hoffecker v. N. C. C. M. Ins. Co.*, 5 Hous. (Del.) 101.]

1850, and where in March, 1851, the plaintiff added one more story to the building without notifying the insurers; although the policy was not actually signed until April, 1851, it was held that the company was not liable, as the implied warranty of defendant not to increase the risk had been broken.¹] The not unusual provision, that if the situation or circumstances affecting the risk upon the property insured shall be altered or changed, with the consent of the insured, so as to increase the risk, the policy shall be void, binds the assured not only not to make any alteration or change in the structure or use of the property which will increase the risk, but prohibits him from introducing any practice, custom, or mode of conducting his business which would materially increase the risk, and also from discontinuing any precaution represented in the application to have been adopted and practised with a view to diminish the risk. Its legal effect is, so far as the representations set forth certain usages and practices observed in and about the business or property insured, as to the mode of conducting the business or management of the property, and as to precautions against fire, that they are not only an affirmation of the truth of the facts at the time they are stated, but a stipulation that, so far as the insured and all those intrusted by him with the care and management of the property are concerned, such mode of conducting the business shall be substantially observed, and such precautions substantially continue to be taken during the currency of the policy.² And as to both, the compliance should be substantial and in good faith, and not merely literal and colorable.³ Whether the change be material is for the jury, and if the jury find that the change increases the risk it will be fatal.⁴ In

¹ [Sillem v. Thornton, 3 E. & B. 868.]

² Houghton v. Manuf. Mut. Fire Ins. Co., 8 Met. (Mass.) 114; Diehl v. Adams, &c. Ins. Co., 58 Pa. St. 443.

³ Ibid. And see *ante*, § 198.

⁴ Hobby v. Dana, 17 Barb. (N. Y.) 111; Jennings v. Chenango County Mut. Ins. Co., 2 Denio (N. Y.), 75; Williams v. People's Ins. Co., 57 N. Y. 274; Manufacturers' &c. Ins. Co. v. Kunkle (Mich.), 8 Ins. L. J. 50. [It is a question for the jury whether the use of a steam-engine for *threshing* materially increases the risk. Long v. Beeber, 106 Pa. St. 466; Farmers' Mut. Fire Ins. Co. v. Moyer, 97

Stokes v. Cox,¹ the Court of Exchequer Chamber upheld a verdict reversing the judgment of the Court of Exchequer setting it aside, — where it was recited in the policy that no steam-engine was employed on the premises, and there was a condition that in case the risk should be increased by an alteration of circumstances the policy should be void. There was a boiler on the premises at the time of the insurance, used for generating steam for heating water and warming the rooms; but a steam-engine was afterwards erected. The fact that the policy stated that no steam-engine was employed, was held not to be a warranty that none should be, but under the condition it might be if it did not increase the risk.² A contemplated change, however, and preparations to that end not amounting to the actual entering upon the new business, have no effect. A warranty against engaging in a more hazardous occupation is not violated by setting out on a journey with an intent to engage in such occupation, the life being lost before any actual engagement therein, and while on the journey, the policy providing that the life — a slave — should not be removed to more southern latitudes. This implied that he might be removed to more northern latitudes. It was allowable to remove him, and the loss being occasioned by a high wind, and not by the intention to employ him in a more hazardous occupation, no provision, express or implied, of the policy was infringed.³

In *Boatwright v. Ætna Insurance Company*,⁴ an attempt

Pa. St. 441, (loss occasioned by the explosion of the engine employed to thresh grain, materially left to jury). The question of an increase of risk is always one of fact for the jury. *Shepherd v. Union Mut. Fire Ins. Co.*, 38 N. H. 232, 240; *Ritter v. Sun Mut. Ins. Co.*, 40 Mo. 40, 41. Even though expert testimony as to the risk on a building being increased by vacancy is not contradicted, the question is for the jury. Uncontradicted expert testimony is not conclusive except where none but experts are capable of forming a judgment. *Cornish v. Farm Buildings Fire Ins. Co.*, 74 N. Y. 295, 297-298.]

¹ 1 H. & N. (Exch.) 320.

² In their opinion the court alluded to the criticisms of Lord Campbell in *Sillem v. Thornton* (cited *post*, ch. xi.), on the cases of *Shaw v. Robberds* and *Pim v. Reid*, apparently with disapprobation, and pointed out the fact that *Sillem v. Thornton* did not at all present the case of a change in use increasing the risk, but rather that of a misrepresentation in describing the property insured.

³ *Summers v. U. S. Ins. An. & Tr. Co.*, 13 La. An. 504.

⁴ 1 Strob. (S. C.), 281.

was made to restrict the meaning of that clause of the policy which provides against any increase of risk by the occupation of the premises for hazardous purposes, so that it should apply only to such hazardous uses as were declared to be so in the classification of risks. But the court did not accept this view of the case; holding, on the contrary, that the occupation for any hazardous purpose, whether enumerated in the special class or not, would avoid the policy.

In *Schmidt v. Peoria Marine and Fire Insurance Company*,¹ the court go so far as to hold that, under a general stipulation that an increase of risk shall avoid the policy, the right of the insurers to object is limited to those losses which occur while the increase of risk continues; and this still appears to be the law of Illinois. But the courts of no other State have gone to that extent. And the case which was referred to and relied upon as having decided the same point in the same way,² was one where the policy expressly provided not that the policy should be void if the risk was increased, but that if the property should be used or appropriated to or for any of the prohibited purposes, the policy should cease and be of no effect so long as such use continued, — a provision which, so far as the reported case shows, does not appear to have been contained in the case under consideration. A reinsured office, which, after the reinsurance, consents to an increase of risk, without notice to the reinsurer, and takes to itself the extra premium, cannot recover on the policy of reinsurance.³

§ 219. *Increase howsoever.* — Even so broad a restriction to the liability of the insurers, as that they shall not be held responsible if the risk be increased by any means whatever without the assent of the insurers, is to be so interpreted that a reasonable use of the property insured, having regard to its nature and circumstances, may be made by the insured. The insurance, unless the terms of the contract forbid, must be presumed to be made with reference to the

¹ 41 Ill. 295.

² *New Eng. Fire & Mar. Ins. Co. v. Wetmore*, 32 Ill. 221.

³ *St. Nicholas Ins. Co. v. Merchants', &c. Ins. Co.* (N. Y.), 10 Ins. L. J. 137.

character of the property insured, and to the owner's use of it in the ordinary way, and for the purpose for which such property is ordinarily held and used, or to cover risks incident to such use. A farmer, for instance, insures his horses against loss by fire and lightning for five years, and describes them as "kept on his farm," or as "stock on premises," or his carriage "as contained in the barn." This does not preclude him from calling upon the insurers for any indemnity if a loss happens off the farm, as when going to church, or to market, or to visit a friend in the neighborhood, or the carriage is at the shop for repairs, or otherwise within the ordinary range of uses to which farmers customarily put their horses. It cannot be supposed that in such a case it is intended that the insured shall get a permit every time he goes off his farm. So precarious an insurance one would hardly take the pains to obtain.¹ So cars on the line of the road will include cars on spurs connected with the road, though not the property of the road.² But where the policy was upon a car-house and the cars "contained" in it, it was held to cover only such cars as might be in it.³ So, generally, if there is nothing in the nature of the property or the mode of its use to lead to the inference that it must have been intended that the property should be covered notwithstanding a change of locality, as where a stock of goods is described as contained in a certain building, the liability will be restricted to loss to such goods only as are in the building.⁴ Increase of risk means material increase, and "additional" risk is not necessarily material increase.⁵ Nor is a permission given by the insured to shipwrecked seamen

¹ *Peterson v. The Mississippi Valley Ins. Co.*, 24 Iowa, 494; *Mills v. Farmers' Ins. Co.*, 37 Iowa, 400; *Everett v. Continental Ins. Co.*, 21 Minn. 76; *McCluer v. Girard, &c. Ins. Co.*, 43 Iowa, 349; *Holbrook v. St. Paul, &c. Ins. Co.*, 25 Minn. 229; s. c. and note, 8 Ins. L. J. 789; *Longueville v. Western Ass. Co.*, 51 Iowa, 553, 555. See also *post*, § 224.

² *Fitchburg R. R. Co. v. Charlestown Mut. Fire Ins. Co.*, 7 Gray (Mass.), 64.

³ *Annapolis R. R. Co. v. Baltimore Fire Ins. Co.*, 32 Md. 37.

⁴ *Harris v. Royal Canadian Ins. Co.*, 53 Iowa, 236.

⁵ *Allen v. Mutual Fire Ins. Co.*, 2 Md. 111; *Mayor of New York v. Hamilton Mut. Ins. Co.*, 10 Bosw. (N. Y. Superior Ct.) 537; *Baxendale v. Harvey*, 4 H. & N. (Exch.) 445.

to take shelter in his storehouse for the night a change of risk in the sense of the policy, although, in violation of the orders of the insured, they kindle a fire in a stove whereby the building is set on fire and consumed.¹ Nor is a policy upon the building of a farmer avoided by the increase of risk consequent upon the use of an itinerant steam threshing-machine introduced temporarily for the purpose of threshing the grain raised upon the premises, it being shown that before the issue of the policy this was customary among farmers, and the proceeding was incidental to the business.² Nor does the clause against increase of risk include ordinary repairs;³ and it is limited and controlled by another provision in the same policy, that an increase of risk from certain specified causes shall only have the effect to suspend the policy while the risk continues.⁴

§ 220. **Increase of Risk.** — Still the general and sweeping clause making the insured responsible for all such changes within his control as increase the risk, is one which needs to be looked to very carefully, as it applies to improvements, such as the erection of new buildings,⁵ or the putting an oven into a house already built,⁶ or the introduction of new machinery.⁷ And even a removal of a steam-engine from one place to another on the same premises, as from a position in the court-yard to a place within the building, may amount to an alteration which, if the removal is availed of by use, will avoid the policy.⁸ And under the usual proviso against increase of risk, if the risk be increased, it becomes entirely immaterial to inquire whether the loss was occa-

¹ *Loud v. Citizens' Mut. Ins. Co.*, 2 Gray (Mass.), 221.

² *Bouchet v. Caisse Gén. des Ass. Agr.*, Dalloz, Jur. Gén. 1870, 3, 16.

³ *Townsend v. Northwestern Ins. Co.*, 18 N. Y. 168; *Lyman v. State Mut. Fire Ins. Co.*, 14 Allen (Mass.), 329; *Ottawa Fire Co. v. Lon. & Liv. & Globe Ins. Co.*, 28 U. C. (Q. B.) 518.

⁴ *Mayor, &c. v. Hamilton Mut. Ins. Co.*, 10 Bosw. (N. Y. Superior Ct.) 537; *Bowman v. Pacific Ins. Co.*, 27 Mo. 152.

⁵ *Murdock v. Chenango County Mut. Ins. Co.*, 2 Comst. (N. Y.) 210; *Francis v. Somerville Mut. Ins. Co.*, 1 Dutch. (N. J.) 78.

⁶ *Boatwright v. Ætna Ins. Co.*, 1 Strob. (S. C.) 231.

⁷ *Reid v. Gore Dist. Mut. Fire Ins. Co.*, 11 U. C. (Q. B.) 345.

⁸ *Barrett v. Jermy*, 3 Wels., Hurl. & Gor. (Exch.) 535.

sioned by the increase of risk, unless the stipulation be that the insurers will not be liable for any loss occasioned by an increase of risk.² But if the insured have two policies from the same office, and they procure, by the payment of an additional premium, the right to increase the risk under one, this increase will not vitiate the other policy, although it be also an increase of risk to the property in that policy insured.³

§ 221. **Increase of Risk; Notice.** — These stipulations against increase of risk usually avoid the contract by the mere fact of the change which causes such increase, unless the insurers be notified of such change, and assent thereto. And where notice is provided for, it must be given within reasonable time, if no time be specified.⁴ But there is oftentimes added another clause, which leaves it optional with the company, after receiving knowledge of the change in the risk, whether to cancel the policy or not. This was the case in *Allen v. Massasoit Insurance Company*,⁵ where

¹ [*Hoffecker v. N. C. C. M. Ins. Co.*, 5 Hous. (Del.) 101. Putting in an additional stove, by increasing the risk where naphtha is used in the business, may avoid the policy permitting the use of *one* stove, although the fire did not arise from the new stove. *Daniels v. Equitable Fire Ins. Co.*, 48 Conn. 105.]

² *Gardiner v. Piscataquis Mut. Fire Ins. Co.*, 38 Me. 439; *Merriam v. Middlesex Mut. Fire Ins. Co.*, 21 Pick. (Mass.) 162.

³ *North Berwick Co. v. N. E. Fire & Mar. Ins. Co.*, 52 Me. 336.

⁴ *Pim v. Reid*, 6 M. & G. 1; *ante*, § 216; *post*, § 225.

⁵ 99 Mass. 160, 161. The court here said: "There are two clauses in the policy which refer to such a state of facts. The first declares that 'if the situation or circumstances affecting the risk thereupon' shall be so altered or changed by or with the advice, agency, or consent of the assured as to increase the risk thereupon, 'the risk thereupon shall cease and determine, and the policy become null and void, unless confirmed,' &c. The second clause is as follows: 'If, during the insurance, the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises or otherwise, or if the company shall so elect, it shall be optional with the company to terminate the insurance after notice given to the assured or his representative of their intentions to do so, in which case the company will refund a ratable portion of the premium.' The two clauses were directed to two objects: the first, to whatever should increase the risk by the consent or agency of the assured; and the second, to whatever should increase the risk without his consent by the agency of others. The first it was intended to guard against absolutely, it being within the power of the assured to prevent; the latter, which might occur without his act, or even without his knowledge, it was just should not affect his rights without notice. The mention of the erection of buildings was merely the specification of one mode in which the

the court takes occasion to refer to these respective provisions, and to state their scope and purpose. On the other hand, it is held in Wisconsin that where, as in case a house becomes vacant, the policy is to be void unless immediate notice is given, and the vacancy occurs with the knowledge of the insurers, and the insurers also have the right to terminate a risk, on notice, for any cause, they will be deemed to have waived the forfeiture if they do not give the notice to terminate.¹

Notice of change of risk must be within reasonable time.² And where one change of risk is notified and assented to by the insurer, another change to a business of the same grade of risks will be presumed to be assented to, and though not notified, will not avoid the policy.³ [Where the insured is to give notice of any increase of risk within his knowledge, and adjacent buildings were erected, the jury were instructed that if they thought the risk was materially increased, and no notice was given, the plaintiff could not recover, and it was held in the court above, that this was sufficiently favorable to the company, and *perhaps* put too great a burden on the insured to require him to take notice of the buildings, or assume his knowledge of them.⁴ When the provision is, that notice must be given if a change is made that will increase the risk "so as to increase the rate of insurance," the company must show not only that the insured knew that the change would increase the risk, but would raise the rate of insurance.⁵ When an increase of risk by adjacent buildings is to be notified to the company, a failure to give notice of

risk might be increased; and appears to have been given by way of illustration. But the previous provision was general, and included all modes in which the risk should be increased by the agency of the insured." See *Williams v. People's Fire Ins. Co.*, 57 N. Y. 274; *Breuner v. Liverpool, &c. Ins. Co.*, 51 Cal. 101. See also *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313.

¹ *Wakefield v. Orient Ins. Co. (Wis.)*, 11 Repr. 655. See also *Lomas v. British Am. Ass. Co.*, 22 U. C. (Q. B.) 310. But see *Williams v. People's Ins. Co.*, *supra*.

² *Canada Credit Co. v. Canada Farmers' Mut. Ins. Co.*, 17 U. C. (Ch.) 418.

³ *Campbell v. Liv. & Lon. Fire Ins. Co.*, 18 L. C. Jur. (Q. B.) 309, reversing s. c. 11 L. C. Jur. 66.

⁴ [*Franklin Fire Ins. Co. v. Graver*, 100 Pa. St. 266, 274.]

⁵ [*Lebanon Mut. Ins. Co. v. Losch*, 109 Pa. St. 100 (adjacent building).]

the erection of a warehouse forty-one feet from the insured building is fatal.¹ If the policy requires the insured to give notice of any change in the neighboring premises, or in the use of the insured premises, which increase the risk, only changes known by him to increase the risk are meant.² If the insured gives the company notice of a change of risk, it is bound to make its election whether to avoid the policy or not, and it must make its decision known within a reasonable time.³ When the change made in the insured premises does not increase the risk, no notice thereof is necessary to the company, under a policy providing that any change of risk must be made known to the company.⁴ In the absence of known restrictions an agent may waive written assent to material alterations in the property.⁵

§ 222. **Increase of Risk: Alteration.** — An almost universal provision of the policy is one intended to guard against the danger of increase of risk by alteration; and increase of risk by alteration may avoid a policy though the policy contain no provisions to that effect. This alteration may take place in the building insured, or in its mode of use or occupation, or in its situation with reference to other buildings, or in any other circumstance tending to change the character of the risk. But not every alteration will avoid the policy, as not every alteration increases the risk.(a) In marine

¹ [Peoria Sug. Refining Co. v. People's Fire Ins. Co., 24 Fed. Rep. 773 (Conn.), 1885.]

² [Rife v. Lebanon Mut. Ins. Co., 115 Pa. St. 531.]

³ [Lattomus v. Farmers' Mut. Fire Ins. Co., 3 Honst. (Del.) 404, 420.]

⁴ [Parker v. Arctic Ins. Co., 59 N. Y. 1, 4.]

⁵ [Packard v. Dorchester Mut. Fire Ins. Co., 77 Me. 144.]

(a) An addition or extension to an insured building does not of itself operate to increase the risk, for improvements made to the building in connection with the extension may decrease the risk. *Meyer v. Queen Ins. Co.*, 41 La. An. 1000. See *Franklin F. Ins. Co. v. Hellerick* (Ky.), 49 S. W. 1066. As to such additions and extensions, and the goods therein being covered by the policy upon the original building, see

Forbes v. American Ins. Co., 164 Mass. 402; *Benton v. Farmers' Mut. F. Ins. Co.*, 102 Mich. 281; *Nappanee Furniture Co. v. Vernon Ins. Co.*, 10 Ind. App. 319; *Gross v. Milwaukee Mechanics' Ins. Co.*, 92 Wis. 656; *Franklin Brass Co. v. Phoenix Ass. Co.*, 65 Fed. Rep. 773; *Davis v. Western Home Ins. Co.*, 81 Iowa, 496; *Carpenter v. Allemannia F. Ins. Co.*, 156 Penn. St. 37.

insurance, a deviation from the voyage is held to avoid the policy; but this has been said to be not on the ground of an increase of the risk, but on the ground that the insured has voluntarily substituted another voyage for the one insured, and the change of the voyage determines the contract from the time it happens.¹ The same strictness, however, is not observed in fire insurance. It would seem, at the first glance, that the enlargement of a building, already contiguous to a building on one side, so that it should be contiguous on two sides, must necessarily increase the risk, the points of contact having been increased. And so it has been contended, in analogy to the doctrine of marine insurance, that a deviation avoids the policy without reference to an increase of the risk. But it is to be considered that, while by deviation the identity of the voyage insured is changed, a building may be altered, repaired, or enlarged without substantially affecting its identity, either as a structure or as a subject-matter of insurance. It may still remain the same, or so nearly so that the increase of risk is inappreciable. Indeed, it may be that there is no increase at all, and possibly even a diminution. The substitution of a slated for a shingled roof, for instance, even though, in the change, the area of the roof should be somewhat enlarged, it is obvious, would not increase the risk, though it would undoubtedly be an alteration. So the extension of a wooden building towards and nearer to an adjacent building might increase the risk, but a substitution for wood of brick, stone, slate, or some other substance less combustible than wood, at the point of nearest proximity, might more than counterbalance the increase of risk from the extension. Whether the alteration, therefore, in any particular case will avoid the policy, depends as a general rule upon its materiality, and this again is determined by the question whether it increases the risk,² — a question of fact to be determined by the jury upon all

¹ *Burgess v. Equitable Mar. Ins. Co.*, 126 Mass. 70, 79.

² [A mere change or alteration in the insured buildings which does not increase the risk will not avoid the policy. *Lattomus v. Farmers' Mut. Fire Ins. Co.*, 3 Houst. (Del.) 404, 420.]

the circumstances of each particular case.¹ Pardessus is of the opinion that the rule as to the effect of a deviation at sea would not be so strictly applied to a transit by land; but that in the latter case the deviation would not avoid the policy, if the insured, after deviation, should return to the route indicated in the policy.² So, if a building or property insured be removed from the place where it was when insured, though it would not be covered by the policy while away or located in another place, yet a restoration of the property insured will restore it to the protection of the policy.³ [But where the goods are described as on the first floor, and in the basement, a removal of all of them to the basement is not an increase of risk.⁴]

§ 223. **Altération; Materiality; Warranty.** — Of the elements to be considered in determining the question of the materiality of an alteration, one of prime importance is, whether the alteration be such that had the insurance been sought on the building, as altered, a higher rate of insurance would have been demanded than was demanded on the building as actually insured.⁵ And if such be the fact, then it would be of no avail to show in an action for a loss that it was not occasioned by the alteration, nor, on the other hand, would it be incumbent on the insurers to show that it was occasioned by the alteration. In other words, the question of materiality does not necessarily depend upon the fact whether the loss is, or is not, occasioned by the alteration.⁶ The question of the materiality of an alteration or change may, however, by express stipulation, be taken out of the

¹ *Curry v. The Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535; *Lavabre v. Wilson*, Doug. 284; *Jolly v. Balt. Eq. Soc.*, 1 H. & G. (Md.) 295; *Stetson v. Massachusetts Mut. Fire Ins. Co.*, 4 Mass. 330. And see *post*, § 224.

² *Cours de Droit Com.* § 596, par. 3.

³ *Ante*, § 101; *post*, § 381; *Boynton v. Clinton & Essex Mut. Ins. Co.*, 16 Barb. (N. Y.) 254; *Annapolis v. Baltimore Fire Ins. Co.*, 32 Md. 37; *Spitzer v. St. Mark's Ins. Co.*, 6 Duer (N. Y. Superior Ct.), 6.

⁴ [*Plinsky v. Germania Fire & Mar. Ins. Co.*, 32 Fed. Rep. 47 (Mich.), 1887.]

⁵ [The rates of insurance charged on burr flouring mills and roller mills is competent in deciding whether the risk was increased by changing the machinery from the burr to the roller process. *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236.]

⁶ *Merriam v. The Middlesex Mut. Fire Ins. Co.*, 21 Pick. (Mass.) 162.

field of debate. It is competent for the parties to agree that this or that alteration or change shall work a forfeiture, in which case the only inquiry will be whether the one in question comes within the category of changes which by agreement shall work a forfeiture. Thus, where in a policy of insurance there is a memorandum of hazardous trades, and it is stipulated that none of these trades shall, during the currency of the policy be carried on in the building insured upon penalty of forfeiting the right to recover in case of loss, the use of the building for such a trade will avoid the policy; and evidence to show that the actual use did not increase the risk of damage by fire will be inadmissible, and this although the policy covered one of the specially hazardous risks.¹ So if the change is to a business which is in the policy denominated specially hazardous, and increase of risk not notified is to avoid the policy, the increase of risk is conclusively presumed.² But even in case where the stipulation with reference to alteration is a warranty, want of literal and exact fulfilment as to minute matters, immaterial to the risk, will not avoid the policy. The jury will consider whether the warranty is substantially observed.³

§ 224. **What Extent of Alteration permissible when not inhibited; Repairs.** — Unless there be a special stipulation to the contrary, when a building is insured, the insured does not relinquish the right of exercising the ordinary and necessary rights of ownership over the same, and may not only make ordinary, but such general repairs and changes as may be necessary or convenient to make the building better subserve its purposes, according to the mode customary in such

¹ *Lee v. Howard Fire Ins. Co.*, 3 Gray (Mass.), 583; *Glen v. Lewis*, 8 Wels., Hurl. & Gor. (Exch.) 607.

² *Gasner v. Met. Ins. Co.*, 13 Minn. 483.

³ *Girard Fire & Mar. Ins. Co. v. Stephenson*, 37 Pa. St. 293. In a recent case it was left to the jury to say whether sinking an artesian well whence gas escaped, and coming in contact with a jet of flame causing the fire, materially increased the risk, with the instruction that such an alteration was not permitted as incidental to the business. *Crane v. City Ins. Co.*, C. Ct. Ohio, 1880, 3 Fed. Rep. 558.

cases;¹ but not alterations materially enhancing the risk,² and not necessary to the enjoyment of the premises, or according to usage, and not the result of the exercise of such ordinary acts of ownership as may fairly be presumed to have entered into the contemplation of the parties at the time when the insurance was effected. "In effect," said Willes, J., in *Thompson v. Hopper*,³ "there being no violation of the law and no fraud of the assured, an increase of risk to the subject-matter of insurance, its identity remaining, though such increase of risk be caused by the insured, if it be not prohibited by the policy, does not avoid the insurance." In other words, the insured, unless restricted in some way in the policy, may use, protect, and enjoy his property as such property is customarily used, enjoyed, and protected; and in any case of dispute the question will be for the jury whether the insured has transcended a fair exercise of his rights.⁴ The only restraints in such a case arise from necessary implication founded on the presumed intentions of the parties, and are such as are called for by the dictates of reason, justice, and public policy. The insurer must be presumed to know that the owner intends to derive benefit from the use and occupancy of his buildings, and to that end he must keep them in tenantable condition. And to put them in tenantable condition prudence may require that, in order to enable him to reap the greatest benefit from his property, he shall do something more than make his building barely inhabitable. Having regard to its appearance and convenience as compared with other property of a similar character in the vicinity, he may make such repairs and alterations as will make it, relatively to other property with which it may come in competition, equally attractive, desirable, and convenient. The contract of in-

¹ [The phrase "increase of risk" means an *essential* increase thereof, and does not include every slight addition to the risk, as by repairs incidental to the business. *Crane v. City Ins. Co.*, 2 Flippin, 576, 580.]

² [Unless restricted by the policy the insured may make any alterations that do not increase the risk. *Planters' Mutual Ins. Co. v. Rowland*, 66 Md. 236.]

³ E., B. & E. 1038, 1049.

⁴ *Jolly v. Balt. Eq. Soc.*, 1 H. & G. (Md.) 295.

insurance is not to be construed so as to restrain the prudent and thrifty from improving their property and their income within the limits of ordinary usage. In the case last cited, where the repairs were of a thorough and extensive character, so much so that the house was given up to the possession of the mechanics engaged therein for several weeks, and was meantime, as is usual in such cases, incumbered with the materials, and strewn with the chips and other waste incident to such repairs, it was contended by the distinguished counsel¹ for the defendants that such repairs avoided the policy, and they likened the case to a deviation in marine assurance; and so it was ruled at the trial. But on appeal the court sent back the case for a new trial, giving a very elaborate opinion, from which we make the extract quoted in the note.² So it was said in *Robinson v.*

¹ Wirt and Taney.

² "The strictness and nicety which have been wisely adopted in the trial of questions arising on policies of marine insurance are not, to their full extent, applicable to the policies of this society. The former are entered into by the assurer almost exclusively on the statements and information given by the assured himself; in the latter case the insurers assume the risk on the knowledge acquired by an actual survey and examination made by themselves, not on representations coming from the insured. This association, therefore, formed for their individual accommodation and security, cannot, upon any sound principle of construction, be viewed as involving in it a mutual relinquishment of the right of exercising those ordinary necessary acts of ownership over their houses which have been usually exercised by the owners of such property. It hence follows that the insured is authorized to make any necessary repairs in the mode commonly pursued on such occasions.

"But if, by the gross negligence or misconduct of the workmen employed, a loss by fire ensue; or if alterations be made in the subject insured materially enhancing the risk, and not necessary to the enjoyment of the premises insured, or according to usage and custom were not the result of the exercise of such ordinary acts of ownership as in the understanding of the parties were conceded to the insured at the time of insurance, and a loss by fire is thereby produced, — then are the underwriters released from all liability to indemnify for such loss. The policy of insurance here being perfectly silent on the subject, and no general principle or rule of law having been established, in cases like the present, by which to determine whether the repairs or alterations were such as the insured had authority to make as being necessary to the user of the property, and whether, if authorized, they were made in the usual and customary way, the proper tribunal to decide those questions is the jury and not the court.

"It appears to have been conceded in argument that ordinary necessary repairs might be made by the insured, but not a thorough repair like the present. The proof of the appellants is 'that the repairs made on this house were necessary for the purpose of rendering it tenantable,' and that they were made in the usual

Mercer County Mutual Fire Insurance Company,¹ with ref-

way. The bill of exceptions shows that by the word 'repairs' both parties meant all that was done to the house. The distinction attempted to be taken has not been supported by any authorities, and in common sense and justice there can be no discrimination between the right to make ordinary repairs and such a thorough repair as is necessary for the purpose of rendering the house tenable.

"It has been stated by the counsel of both parties that there can be found in the books no adjudication on a policy against fire analogous to the present. It becomes this court, then, maturely to deliberate before they sanction the doctrine contended for by the appellees, which, contrary to justice and the understanding and intention of the parties at the formation of their contract, annihilates all claim to indemnity on the part of the insured, and yet leaves the insurer in the full enjoyment of the premium for responsibility. It perhaps scarcely ever happens that during the period of seven years, the usual term to which such policies are limited, some trifling alteration or addition is not made to the property insured; as a new door or window opened, an additional closet, shelf, or such like fixture erected: any of which acts, if the grounds assumed by the appellees are supported, change the identity of the property, create a new risk, and absolve the underwriters. Indeed, if alterations and additions are, *per se*, a change of the risk, it would follow that the erection of a parapet wall in a city, a substitution of brick for a wooden floor, or a marble for a wooden mantel-piece, or the introduction of a coal-grate in a chimney constructed for wood as the only fuel, though lessening the peril, would discharge the policy; as, according to the principles of maritime insurance, every *change of the risk* exonerates the underwriter, whether the danger be increased or diminished, or happen the loss from whatsoever cause it may. To infer, without any express provision or necessary implication arising out of the contract itself, or public policy demanding it, that the insured surrendered all right to make such commonplace, trivial, unimportant additions to and alterations of his property, as its safety or his convenience or comfort might suggest, is a construction too rigorous to be rational; the effect of which would be to render worse than useless those most useful and indispensable institutions in populous cities, — fire insurance companies, — and give a fatal stab to our enterprising manufacturers, who, if suing for a loss under a policy covering the manufactory and machinery, would be turned out of court without remedy or hope, if perchance the insurer could prove that the most immaterial alteration or improvement were made in his machinery, by substituting the power of the screw for that of the lever, the leather strap for the iron wheel, or the iron for the wooden shaft. But suppose all the rules of marine insurance applicable to the question at bar, can a case be found in which it was ever contended that to add to the equipment of a vessel insured a yard or more of canvas, or an additional cleat or clew-line, was to vacate the insurance?

"The numerous and warmly litigated questions of deviation and change of risk, which burden the records of courts of justice, bear no analogy to that now under consideration. There, departing from the course of the voyage, or performing it at any other time than that required by the policy, subjects the vessel to different perils than those contemplated by the contracting parties: a flaw, a whirlpool, a breaker may be encountered in one course of the voyage which would be a cause of neither danger nor alarm at a mile's distance. The tempests or casualties attending the performance of a voyage to-day bear no similitude or pro-

¹ 3 Dutch. (N. J.) 134.

erence to a change of use from one business to another of greater risk, that if the insured exposed the property to a risk far more hazardous than could have been contemplated by the insurers, good faith required that they should have notice, and if the insured neglected to notify them it would amount to that gross negligence which would defeat a recovery.

§ 225. **Alteration; Change in Surroundings; Enlargement.** — The same rules are applicable to changes in the situation of the property insured relative to other property, and other surrounding and incidental circumstances tending to increase the risk. If the policy provide for notice of alteration or change in risk, on penalty of forfeiture, the insured takes the risk if he fails to give notice of a change which increases the risk. The only safe course for the applicant is to notify of all changes.¹ If the contract be silent on this point, any change within the limits of fair and honest dealing is permissible, even though to that change the destruction of the property may be due.² [A clause allowing neces-

portion to those attendant on a like voyage to-morrow. But no such total revolution is wrought in the perils to a house insured against fire which has undergone alterations or repairs; it remains subject to the same perils, although their degree may be increased or diminished. It becomes a question of *increase*, not of *change* of risk, for the ascertainment of which the jury, and not the court, is the proper tribunal." For further illustration of the doctrine of this case, see *Wash. Ins. Co. v. Davison*, 30 Md. 92, 107; *Franklin Ins. Co. v. Chicago Ice Co.*, 36 id. 102, 121; *Grant v. Howard Ins. Co.*, 5 Hill (N. Y.), 10; *Rann v. Home Ins. Co.*, 59 N. Y. 387; and especially the very elaborate case of *James v. Lycoming Fire Ins. Co.*, 4 Cliff. C. Ct. (Mass.) 272. See also *Anderton v. Home Ins. Co.*, 2 Ins. L. J. 877; *Dorn v. Germania Ins. Co.*, C. Ct. (Ohio), 1 Law & Eq. Repr. 132, 133. And see also *ante*, §§ 219, 223, note at the end, and *post*, § 230.

¹ *Pottsville Mut. Fire Ins. Co. v. Horan* (Pa.), 9 Ins. L. J. 201; *ante*, §§ 216, 221.

² *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y. Superior Ct.), 632; *Grant v. Howard Ins. Co.*, 5 Hill (N. Y.), 10, 16; *Western Farmers' Mut. Ins. Co. v. Miller*, 1 Handy (Cincinnati Superior Ct.), 325; *Gates v. Madison County Mut. Ins. Co.*, 1 Seld. (N. Y.) 469; *Young v. Washington County Mut. Ins. Co.*, 14 Barb. (N. Y.) 545. In *Howard v. Kentucky & Louisville Ins. Co.*, 13 B. Mon. (Ky.) 282, it is said that in such a case the policy will not be avoided unless the increased risk is the cause of the loss, in which case what was unobjectionable becomes misconduct, — a doctrine which cannot be said to be in accordance with the current of opinions, nor is it supported by *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y. Superior Ct.), 632, the only case cited as an authority. That case says, *obiter*, that if the increase of risk be fraudulent and occasion the loss, it may be a defence.

sary alterations and repairs does not permit an addition two hundred feet long and twelve feet wide, and parol evidence that such an enlargement was contemplated by the parties at the time of insurance is not admissible to vary the written contract.¹] In *Joyce v. Maine Insurance Company*,² there was the peculiar provision that if the risk was increased by the erection of buildings, or the occupation of neighboring premises, it should be the duty of the insured to give immediate notice thereof to the insurers, that they might terminate the insurance if they should so elect. But no penalty for neglect to give notice was fixed. Such a provision was held to afford to the insurers no ground of defence, in case of its violation, as they cannot assume that they would have terminated the insurance if notice of the change had been given. And in point of fact such a provision seems to have no force, the insurers having no better standing in court than they would have without it. Under a somewhat similar provision in a policy which provides that the trustees may declare it null and void if the insured premises be repaired or enlarged so as to render the risk greater, the notice of the trustees does not conclude the insured. He may yet go to the jury on the question whether the enlargement did in fact increase the risk.³ If any particular act is to be done, as, for instance, if a building contiguous to the property insured is to be removed, this can only be required within a reasonable time; and if a loss occur before the removal, it is for the jury to say whether that reasonable time had elapsed before the loss.⁴

§ 226. **Increase of Risk during Alteration ; Increase and Decrease.** — But if the policy provides against an alteration and enlargement which shall increase the risk, a considerable and deliberate alteration and enlargement not incidental to the use of the property will avoid the policy, if it increases

¹ [Frost's Detroit Lumberworks v. Miller's Mut. Ins. Co., 37 Minn. 300.]

² 45 Me. 168.

³ Stetson v. Massachusetts Mut. Fire Ins. Co., 4 Mass. 330.

⁴ Lindsey v. Union Mut. Fire Ins. Co., 3 R. I. 157.

the risk during the alteration; and whether the alteration is such a one is for the jury. It seems, however, that ordinary repairs under such circumstances would not.¹ In *Hencker v. British America Assurance Company*,² where extensive alterations were made both in the building itself and the surroundings, the court refused to allow the jury to find — there being an actual increase of risk in the building itself — whether, on the whole, taking into consideration any decrease of risk in the surroundings, there was any actual increase of risk. But in *Date v. Gore District Mutual Insurance Company*,³ where the changes were all within the building, some calculated to increase the risk and others to diminish it, the court allowed the jury to strike the balance, and say if, on the whole, there was any increase.

§ 227. **Alteration by others than the Insured.** — Unless the consequences are restricted to the acts of particular persons, an alteration, such as would work a forfeiture of the policy, if made by the insured, is equally fatal if made by a tenant without the knowledge or consent of the insured.⁴ That it is made by a tenant is no excuse, if contrary to the covenants in the policy. The tenant's possession is the landlord's possession. The latter continues to be the party insured, and the covenants which he enters into remain whether he occupies personally or by tenant.⁵ [And here is always an implied promise of the insured not to increase the risk, and if the tenants so alter or use the property as to increase the risk of injury or loss by fire, the company is

¹ *Lyman v. State Mut. Fire Ins. Co.*, 14 Allen (Mass.), 329.

² 14 U. C. (C. P.) 57. So it was held in *Pottsville Mut. Fire Ins. Co. v. Horan* (Pa.), 9 Ins. L. J. 201; *Lomas v. British Am. Ass. Co.*, 22 U. C. (Q. B.) 310, 318.

³ 15 U. C. (C. P.) 175.

⁴ [Long v. Beeber, 106 Pa. St. 466; *Steimnetz v. Franklin Ins. Co.*, 6 Phila. 21, 23 (keeping gunpowder); *Liverpool, &c. Ins. Co. v. Gunther*, 116 U. S. 113 (hazardous means of light); *Hawell v. Baltimore Eq. Soc.*, 16 Md. 377, 386-387 (hazardous occupation of tenant without assured's knowledge). If one who occupies premises by permission of the insured violates any of the conditions of the policy, the effect is the same as though the assured had himself violated them, although he may be ignorant of the tenant's conduct. *Liverpool, &c. Ins. Co. v. Gunther*, 116 U. S. 113, 128.]

⁵ *Diehl v. Adams County Mut. Ins. Co.*, 58 Pa. St. 443.

released, and the origin of the fire is an immaterial question.^{1]} If the insured desires to escape so large a responsibility, he must see to it that the terms of the policy are not so broad as to include the acts of third persons. If he do not do this, he will find, perhaps when it is too late, that he has agreed to be responsible for the acts of third persons.² And upon this principle, an alteration by a mortgagor, after an assignment of the policy, and without the knowledge of the assignor, avoids the policy.³ A substantial change of use, if prohibited on penalty of forfeiture, though made by a tenant or agent without the knowledge of the owner, the insured, is fatal, unless, as is the case in some policies, he is made responsible for such changes only as he permits.⁴ [Or the policy is to be affected only by respective increase of risk by means within the control of the assured. Then mere imprudence or negligence of either the assured or his agent would not avoid the policy.^{5]} But a tenant is not a proprietor within the meaning of a provision against alterations by act of the proprietor, and an alteration therefore by a tenant, not known to the owner, does not avoid the policy.⁶

§ 228. **Alteration; Premises.** — “Premises” means building, and though there is an alteration in the status of the property insured increasing the risk, it is not an alteration in the “premises” or building in which the property insured is located, and therefore works no forfeiture.⁷ But a provision against lighting the “premises” insured, in a policy on

¹ [Hoffecker v. New Castle, &c. Ins. Co., 5 Honst. (Del.) 101.]

² Shepherd v. Union Mut. Fire Ins. Co., 38 N. H. 232.

³ Kuntz v. Niagara Dist. Fire Ins. Co., 16 U. C. (C. P.) 573; Grosvenor v. Atlantic Mut. Ins. Co., 17 N. Y. 391; State Mut. Fire Ins. Co. v. Roberts, 31 Pa. St. 438; Loring v. Manuf. Ins. Co., 8 Gray (Mass.), 28.

⁴ Fire Assoc. of Philadelphia v. Williamson, 26 Pa. St. 196; Howell v. Balt. Eq. Soc., 16 Md. 317; Appleby v. Fireman's Fund Ins. Co., 45 Barb. (N. Y.) 454; Sanford v. Mechanics' Mut. Fire Ins. Co., 12 Cush. (Mass.) 541. But see *post*, § 240.

⁵ [Gunter v. Liv., Lond. & Globe Ins. Co., 20 Blatch. 362, 367.]

⁶ Padelford v. Prov. Mut. Fire Ins. Co., 3 R. I. 102.

⁷ Robinson v. Mercer County Mut. Ins. Co., 3 Dutch. (N. J.) 134, 135; Leggett v. Ætna Ins. Co., 10 Rich. Law (S. C.), 202; *post*, §§ 243, 239 B. And see also Howard Fire & Mar. Ins. Co. v. Cornick, 24 Ill. 455.

a stock of goods, refers to lighting the building as well as the merchandise.¹

§ 229. **Alterations at Risk of the Insured.** — A provision that alterations and repairs are at the risk of the insured has been said to mean, not that they shall necessarily avoid the contract, but that the assured shall assume the hazard of their increasing the liability of the insurer.² But in *Kingsley v. New England Mutual Insurance Company*,³ a condition that the insured should “take all risk from cotton waste,” was held to mean that if the fire originated in cotton waste the insurers were not to be responsible.

§ 230. **Alteration in Mode of Use.** — Under a policy insuring in general terms a store, building, or factory, without restriction as to the use or as to the kind of goods to be kept, or as to increase of risk generally, any kind of goods may be kept, and any kind of business carried on, and any change of circumstances made, not expressly prohibited, within the limits of good faith and fair dealing; and the fair inference, from the fact that certain kinds of goods and certain kinds of business are classed as hazardous, is, that all others are within the scope of the policy.⁴ And in the absence of fraud, it is immaterial whether the newly introduced property, trade, or business is more or less hazardous. Subject only to the restraints of honesty and fair dealing, the insured may use his property as he sees fit, and has towards the insurers no obligations not set down in the con-

¹ *Stettiner v. Granite Ins. Co.*, 5 Duer (N. Y. Superior Ct.), 594. In *Trench v. Chenango County Mut. Ins. Co.*, 7 Hill (N. Y.), 122, it was held that where buildings and personal property were insured in the same policy, and there was a breach of warranty in the failure to state all the buildings within a certain distance, the breach avoided the policy only as to the building, and that as to the personal property there might be a recovery therefor. But this doctrine was doubted in *Sexton v. Montgomery County Mut. Ins. Co.*, 9 Barb. (N. Y.) 191, repudiated in *Kennedy v. St. Lawrence County Mut. Ins. Co.*, 10 Barb. (N. Y.) 285, and the case itself, upon this point overruled in *Wilson v. Herkimer County Mut. Ins. Co.*, 2 Seld. (N. Y.) 53.

² *Girard Fire & Mar. Ins. Co. v. Stephenson*, 37 Pa. St. 293. And see also *Perry County Ins. Co. v. Stewart*, 19 Pa. St. 45.

³ 8 Cush. (Mass.) 393.

⁴ *Langdon v. Equitable Ins. Co.*, 1 Hall (N. Y. Superior Ct.), 226; s. c. 6 Wend. (N. Y.) 623.

tract.¹ Undoubtedly there may be such a marked and serious change from a risk of the lowest grade to one of the highest, and under such circumstances as obviously not to have been within the contemplation of either party; in fact, converting the property insured into a substantially different subject-matter, and such a change as no fair-minded man would regard, or have a right to regard, as protected under the original policy, — as where loose, unbaled hay is stored in a building insured as a grocery. In such a case the question would be, whether the change was in degree or kind within such reasonable limits as to be consistent with good faith, or whether it was of such an extravagant character as to evince an utter disregard of the just rights and expectations of the insurers, and an obvious absence of good faith.²(a) If the policy, however, provide against any

¹ *Pim v. Reid*, 6 M. & G. 1; *Shaw v. Robberds*, 6 Ad. & El. 75. In *Sillem v. Thornton*, 3 El. & Bl. 868, Lord Campbell says, *Pim v. Reid* was decided solely on a question of pleading, and doubts the doctrine stated in that case. But the case then under consideration did not at all resemble either of the cases criticised.

² *Robinson v. Mercer County Mut. Fire Ins. Co.*, 3 Dutch. (N. J.) 134; *Dittmer v. Germania Ins. Co.*, 23 La. An. 458. And see also the observations of Lord Campbell in *Sillem v. Thornton*, 3 El. & Bl. 866, cited *post*, § 257.

(a) If the insurer asks no information and the insured makes no representations, and the insurer chooses to assume the risk, he must be presumed, in point of law, to do so at his own peril; and when the insurer is familiar with the property and its uses and occupation before insuring, he is estopped from setting up a misstatement in reference thereto in the application. *Wytheville Ins. Co. v. Stultz*, 87 Va. 629. An insurance company, in order to avoid a policy on the ground that the premises were put to a use not represented when the insurance was made, whereby the risk was increased, must show that the assured knew that such use increased the risk and the rate, and that he concealed it from the company. *McGonigle v. Susquehanna Mutual F. Ins. Co.*, 168 Penn. St. 1. A provision in a policy of fire insurance declaring that it

shall be forfeited "by any change in the use or condition of the building, including additions or repairs, or by the erection of other buildings, or in any other manner by which the degree of the risk is increased, unless due notice is given to the company, and a new agreement is entered into," applies to such changes as are of a permanent nature, and not to mere temporary changes in the use and occupation of the premises; hence a mere temporary use of a machine for threshing grain for a few hours on the premises where the insured property is located will not, *per se*, work either a forfeiture or suspension of such policy. But if the insured, or one to whom he has intrusted the entire custody of the property, and given full freedom in its use, should, by doing any act or acts which one in the exercise of ordinary care and dili-

change of use increasing the risk, the question will not be whether the increase is greater or less, but whether it is material,¹ though, even under such a prohibition, while the insured is bound to a rigorous course of conduct in preventing any increase, it ought to be left to the jury whether the materiality is substantial, as whether, for instance, the keeping a jug of petroleum in one's room for medicinal purposes is an occupation of the premises in a way to make them

¹ *Hervy v. Mut. Fire Ins. Co.*, 11 U. C. (C. P.) 394.

gence would not do under like circumstances, so change the use and occupancy of the premises as to materially increase the hazard of the insurance, the insurance company would not be liable for a loss directly resulting as a consequence of such increase of risk. *Adair v. Southern Mut. Ins. Co.*, 107 Ga. 297. Insurance upon a tin-shop covers the making of tin cans and the soldering of strips of tin for roofing, this being the obvious daily work of a tin-shop. *Va. F. & M. Ins. Co. v. Thomas*, 90 Va. 658. A policy on a canning factory, to cover the interval after the season was ended, and providing that it should be occupied only for storage, is not violated by clearing up the premises, and building a fire to empty the boiler and pipes of water. *Krug v. German F. Ins. Co.*, 147 Penn. St. 272. A policy insuring a building while occupied as a saddlery, and providing that it shall be void if the risk is increased by a change of occupation, is not avoided by a change of occupation when the risk is not increased. *East Texas F. Ins. Co. v. Kempner* (Tex. Civ. App.), 23 Ins. L. J. 549. Where the policy stipulated that the property was to be occupied as a foundry and machine shop, and it was never so used, the stipulation was held a warranty, and the knowledge of its breach by an agent authorized only to receive applications and deliver policies was held not a waiver. *Sun Mutual Ins. Co. v. Texarkana Foundry & Machine Co.* (Texas), 20 Ins. L. J.

856. Where the insured property was situated in adjoining State, and the persons insured were residents of another State, but the agent of the insurance company through whom the insurance was effected resided near the property insured, and had notice of the uses to which the building was applied, his knowledge is deemed that of the company, and it is too late, after a loss has occurred, to object upon the ground that the building was applied to uses prohibited in the policy. *Springfield F. & M. Ins. Co. v. McLimans*, 28 Neb. 846. Where, under a policy stipulating that a sprinkler "now in use" should be maintained, the company accepted the premiums with knowledge of the fact that there was no sprinkler, this was held a waiver. *Milkman v. United Mut. Ins. Co.*, 20 R. I. 10. Where the defendant having insured against loss by fire a threshing machine, engine, and separator, "while not in use," the property, which had not been used for threshing for some two weeks, was hauled out into the country, and left standing near a farm-house, preparatory to its intended use a few days later, and, while standing there, the separator was destroyed by a fire, which was not caused by any hazard incident to the actual use or operation of either the engine or separator, the property was held not to be "in use" within the meaning of the policy. *Minneapolis Threshing Machine Co. v. Firemen's Ins. Co.*, 57 Minn. 35.

more hazardous.¹ [The occupation of a portion of a "tavern-barn" as a livery stable increases the risk and avoids the policy.²]

§ 231. **Statement of Present Use generally no Warranty.** — Where the policy merely describes the property insured as used or occupied for a particular purpose, and there is no prohibition of a change in the use or occupation, the insured will only be held to the truth of the statement at the time when the insurance is effected. Such statement will not be construed into a warranty that the subject-matter of insurance shall continue to be so occupied or used during the currency of the policy. Nor will a change in the use or occupancy of the property insured, still keeping within the same character of risk, and not increasing the risk, avoid the policy. If the insurers wish to guard absolutely against change, they must do so by appropriate and positive stipulation.³ (a) In *Wood v. Hartford Fire Insurance Company*,⁴ the insurance was upon a paper-mill, which was a special memorandum risk, with a prohibition to use for purposes classed as "hazardous or extra-hazardous," and a grist-mill was added to, or rather substituted for, a portion of the paper-mill, but without substantially affecting the efficiency of the latter. And it was held that this was not a change from a paper-mill to a grist-mill, and, if it had been, as the grist-mill was also a memorandum risk, it would not have avoided the policy. So a dwelling-house may be used for a board-

¹ *Williams v. People's Ins. Co.*, 57 N. Y. 274.

² [*Hobby v. Dana*, 17 Barb. 111, 115.]

³ *Smith v. Mechanics' & Traders' Fire Ins. Co.*, 32 N. Y. 399; *Schmidt v. Peoria Mar. & Fire Ins. Co.*, 41 Ill. 295. But see *post*, §§ 231, 255.

⁴ 13 Conn. 533.

(a) A clause in a policy which makes express provision for the future cannot be done away by mere implication or inference; but when an existing fact is at variance with a clause of a policy, and is known by the insurer to be so, there may be an implication that the clause is not insisted upon. *Newmarket Sav. Bank v. Royal Ins. Co.*, 150 Mass. 374; *Stone v. Howard Ins. Co.*

153 Mass. 475. Representations of existing facts, as the description in the policy that the insured property is a dwelling-house occupied by tenants, is a vital warranty of such occupancy at the inception of the contract. *Boyd v. Ins. Co.*, 90 Tenn. 212. So misrepresentations as to previous fires in an insured mill are fatal. *Rosebud M. Co. v. Western Ass. Co. (U. S. C. C.)*, 25 Ins. L. J. 693.

ing-house, if the latter be not included in some class of greater risk.¹ Under a permitted use, an enlarged use for the same purpose is not such an increase of risk as avoids a policy. The increase of risk to have that effect must come from some other source.² A mere exclusion from the risk is not a prohibition which works a forfeiture. Thus, where a policy expressly provides that "gunpowder is not insurable unless by special agreement," and enumerates gunpowder amongst the extra-hazardous articles, and further provides that the building insured is privileged to contain extra-hazardous merchandise, gunpowder may be kept without prejudice to the right to recover under the policy in case of loss. The effect of the stipulation is merely to exempt the insurers from liability for the gunpowder.³

§ 232. **Classification of Risks; Hazardous Goods.** — As not all subject-matters of insurance are equally hazardous, insurers have adopted the plan of classifying the various risks which they assume into special categories, such as not hazardous, hazardous, extra-hazardous, specially hazardous, and memorandum articles, or such as are not insurable at all, or only upon special terms, upon which several classes different rates of insurance are charged. It is obvious that an insurance upon one class ought not, and in point of law it does not, cover property in goods in another; and the policy may be, and frequently is, so drawn that if, under a policy insuring specifically one class, articles, or modes of use, or practices, embraced in another according to the arbitrary classification of the insurers, are introduced, kept, stored, or permitted, the policy becomes void; as when the policy expressly provides that any particular class or classes of articles shall not be kept, nor any particular practice or mode of use adopted or carried on, unless specially provided for. Thus, if the insurance be in terms upon "stock in trade, consisting of merchandise not hazardous," the keep-

¹ *Rafferty v. New Brunswick Fire Ins. Co.*, 3 Harr. (N. J.) 480; *post*, § 237.

² *Mayor, &c. v. Hamilton Fire Ins. Co.*, 10 Bosw. (N. Y. Superior Ct.) 537; *Baxendale v. Harvey*, 4 H. & N. (Exch.) 445.

³ *Duncan v. Sun Fire Ins. Co.*, 6 Wend. (N. Y.) 488.

ing of hazardous articles, though a part of the general stock, so denominated in the memorandum, will avoid the policy, since the very description of the subject-matter excludes such hazardous articles. The doctrine, in such cases, is well stated by Shepley, C. J., in *Richards v. Protection Insurance Company*,¹ where the policy was on "stock in trade consisting of merchandise not hazardous," and where the keeping of oil, tallow, and glass, enumerated as extra-hazardous, as part of the stock, was held to avoid the policy.

And this doctrine has been recently applied in a case where fireworks and other merchandise, hazardous and extra-hazardous, were included in the policy, but which also

¹ 30 Me. 273. The judge said: "Four classes of hazards are named in the conditions annexed to the policy, denominated not hazardous, hazardous, extra-hazardous, and memorandum of special risks. The goods insured were by the plaintiffs declared to be of the first class. The goods before named were not of that class, but were of the second class, denominated hazardous. (The plaintiffs procured insurance 'on their stock in trade, consisting of not hazardous merchandise.') Insurance is proposed to be made upon goods contained in these three different classes at different rates of premium. The classes of hazard, and the conditions of insurance annexed to the policy, form a part of the contract between the parties. That contract requires mutual good faith and fair dealing. The law presumes that the parties acted with intelligence. The defendants did not propose to insure goods of the class denominated hazardous at the premium affixed for the class denominated not hazardous. Nor did they propose to insure goods composed partly of one class and partly of the other, at the rate of premium affixed to the least hazardous. This appears from the language used; for 'groceries, with any hazardous articles,' are enumerated in the class of hazardous. If the plaintiffs, having procured insurance on their stock in trade, consisting of not hazardous articles, could have kept a stock of goods for sale composed entirely of hazardous articles, and could have recovered for a loss of them by fire, they could do so only by compelling the defendants to become insurers, and to bear the loss for a compensation less than the one affixed to such a class of goods, and less than the one agreed upon by the parties as appropriate to such a risk. So if they could have kept goods for sale composed partly of the first and partly of the second class of risks, and could, after a loss of them by fire, have recovered for them, the defendants would have been compelled to bear the loss for a premium less than that for which they would have knowingly assumed the risk. The injustice in the latter case would not be so great as in the former, but a recovery would be equally unauthorized according to the terms of the contract. The description of the property insured in the body of the policy, when the rate of premium is thereby affected, operates as a warranty that the property is of the character and class described; and that the property is all, and not partly, of that character and class. Such a warranty is in the nature of a condition precedent, and performance of it must be shown by the person insured before he can recover upon his policy." See also *Pindar v. Resolute Fire Ins. Co.*, 38 N. Y. 366.

enumerated fireworks as in a different class. Thus, under a policy insuring "fireworks, ordnance stores, and other merchandise, hazardous and extra-hazardous," "in the second class of hazards," in which were included fire-crackers

! matches, but putting "fireworks" in the specially hazardous category of the third class, it was recently held in New York that keeping that description of fireworks, which was so specially dangerous as by the ordinance to be prohibited storage in the city, if thereby the risk was increased, and it seems if it was not, would avoid the policy. The court said it could not be presumed that it was intended to cover an article so specially hazardous as to be prohibited storage, but only such as were permitted storage and to be sold at retail.¹ And permission to keep fire-crackers does not give the right to keep fireworks. Thus insurance "on a stock of fancy goods and other articles in his line of business," &c., and "privileged to keep fire-crackers on sale," does not authorize the keeping of fire-works, since fireworks are not included under the license to keep fire-crackers, and they could not be included under the general words, "other articles in his line of business," where by the terms of the policy they are not covered unless specially permitted.²

§ 233. **Stock in Trade, such as usually kept.** — While, however, as we have seen in the preceding section, if the policy insures only one class of articles and expressly excludes other classes, the keeping of an article in the excluded class, although it be usually kept with the class of goods actually insured, will avoid the policy, yet if the policy describe the

¹ Jones v. Fireman's Fund Ins. Co., 2 Daly (N. Y.), 307, affirmed 51 N. Y. 318.

² Steinbach v. Relief Ins. Co., 13 Wall. (U. S.) 183. But in Steinbach v. La Fayette Fire Ins. Co., 54 N. Y. 90, 95, which was a case upon similar facts, the New York Court of Appeals referred to this case as not well considered, and adhered to the settled line of decisions in that State to the contrary. And this case is cited and approved by Clifford, J., in James v. Lycoming Fire Ins. Co., 4 Cliff. C. Ct. 272. In Wood v. North Western Ins. Co., 46 N. Y. 421, where the keeping of camphene or "any other inflammable" liquid was prohibited, and it was found that kerosene was kept, the court refused to set aside a verdict for the plaintiff, there being no proof that kerosene was inflammable, and they would not assume it.

property, the stock insured, as such as is "usually kept in a country store," this qualification enlarges the scope of the policy, so that it will attach to and cover memorandum articles, or any articles enumerated in the non-insured classes.¹ The keeping of the memorandum articles is usually made to avoid the policy, unless otherwise provided therein. And this qualification of the description of the subject-matter is equivalent to a provision in the policy whereby the memorandum articles are permitted to be kept and insured.² So where the policy is upon "merchandise such as is usually kept in country stores." Under such a description of the risk, all articles such as can be shown to be usually kept in country stores are covered and protected by the policy, although they may be enumerated in the second classes of risks.³ [If fireworks are usually kept in confectionery stores the keeping of them will not violate a policy covering the usual stock of such stores, although

¹ [If a policy insures "drugs" and "such other merchandise as is usually kept in a country store," and the *printed* provisions except benzine unless permission is obtained, it is competent to show that benzine is usually kept in a country store, and that the general agent stated at the issue of the policy that it included benzine. *Carrigan v. Insurance Co.*, 53 Vt. 418. When the printed part of a policy of insurance on goods prohibited the keeping of saltpetre, but by a written portion "all goods kept for sale in such stock" are permitted to be kept, the latter was held to overcome the former; *Stout v. Commercial Union Ass. Co.*, 11 Biss. 309, 313, 7th Cir. Ind. 1832, 11 Ins. L. J. 688, 14 Rep. 577, distinguishing *Steinbach v. Ins. Co.*, 13 Wall. 183, or trying to do so; and even the fact that gunpowder, also a prohibited article, was specially permitted did not prove that it was the only prohibited article permitted. A policy on a "stock of dry-goods, groceries, and merchandise usually kept in a country store" will cover articles usually so kept, as gunpowder, although prohibited by a general printed clause. But where in addition to such prohibition there is a clause allowing a specified and reasonable quantity of the article to be kept, evidence is not admissible to show that country stores usually keep a larger quantity of it. *Pittsburgh Ins. Co., v. Frazee*, 107 Pa. St. 521. But when the written part of a policy insured all goods commonly kept in a country retail store against loss by fire, "except as hereinafter provided," and a subsequent printed clause excepted benzine and turpentine, it was held, overruling the decision of the lower court, that the policy was avoided by keeping turpentine. *Lancaster Fire Insurance Company v. Lenheim*, 89 Pennsylvania State Reports, 497, 502; *Insurance Company v. Kroegher*, 2 Norris, 64.]

² *Pindar v. King's County Ins. Co.*, 36 N. Y. 648.

³ *Franklin Fire Ins. Co. v. Updegraff*, 43 Pa. St. 350, 353. And see *post*, § 239.

they are expressly prohibited in the printed provisions.¹(a) Where the printed conditions exclude certain articles as extra-hazardous, and the written description of the risk includes some of the articles, the writing overweighs the print; but "family groceries, wines, liquors, tobacco, and cigars" does not cover fireworks.²] But in the case of *Macomber v. Howard Fire Insurance Company*,³ where the policy was upon a stock in trade described as consisting of "dry-goods, groceries, hardware, crockery, glass and wooden ware, Britannia and tin ware, stoves of various kinds, and *various other wares and merchandise*," and provided that the use of the premises for the purpose of keeping or storing any of the articles denominated hazardous or extra-hazardous in the conditions annexed to the policy should avoid the policy unless otherwise especially provided for, and "groceries with any hazardous articles," "rags," and other articles were enumerated as hazardous, and were in fact kept upon the premises, the policy was held to be void, although the excepted articles were such as were usually kept in such a stock in trade. Under the modern tendency, however, to interpret liberally in favor of the object of the contract, and, in cases of doubt, strictly against the insurer, it is doubtful if this case would be followed in other courts except upon the same identical facts, and perhaps not

¹ [Plinsky v. Germania Fire & Mar. Ins. Co., 32 Fed. Rep. 47 (Mich.), 1887.]

² [Georgia Home Ins. Co. v. Jacobs, 56 Tex. 366.]

³ 7 Gray (Mass.), 257. See also *Wetherell v. City Fire Ins. Co.*, 16 Gray (Mass.), 276, where the policy was upon a "store," and "sail-making" and "confectionery" were introduced, though prohibited.

(a) The insurer's permit to store fireworks in the insured building for fifteen days does not justify their retention there beyond that period, or waive any future forfeiture for this cause; but at the expiration of the fifteen days, the insured's failure to remove the fireworks makes the policy *ipso facto* void. *Betcher v. Capital F. Ins. Co.* (Minn.), 29 Ins. L. J. 115; *Heron v. Phoenix Mut. F. Ins. Co.*, 180 Penn. St. 257;

Phoenix Ins. Co. v. Flemming, 65 Ark. 54. The keeping of fireworks over the night before the Fourth of July is within a condition of the policy avoiding it in case the hazard is increased with the insured's knowledge, or if fireworks, &c. are allowed on the premises. *Heron v. Phoenix Mut. F. Ins. Co.*, 180 Penn. St. 257. See *Heffron v. Kittanning Ins. Co.*, 132 Penn. St. 580.

in the same court.¹ [There is, however, a case in Pennsylvania where the policy provided that no petroleum, &c., should be "had or kept" on the insured premises (the insurance being on a stock of merchandise in a common country store), and it was held that a charge of the lower court that if petroleum was usual in the stock of that kind of a store the assured could recover, was error. The court remarked that perhaps the very reason of the prohibition was that such a custom existed.² It would be useless if such goods were not so kept. And in Ohio, in case of a policy on a "general stock of hardware and agricultural implements," evidence will not be admitted to show a custom among hardware dealers in the villages of Ohio to keep gunpowder and petroleum.³]

§ 234. *Permission strictly construed.* — But nothing will be allowable under such an implied permission not fairly within the scope of the general words of qualification; and though a policy prohibiting the use of premises for hazardous purposes may in certain cases cover the keeping for sale of hazardous articles, on the ground, by fair implication, that they are included within the general stock insured, it will not cover the use of such hazardous articles for lighting or other like purpose, if their use be prohibited upon the premises.⁴ It is one thing to appropriate premises to the keeping of a hazardous article for sale, and another to use the hazardous article upon the premises for the purpose of illumination or manufacture. A permission to keep kerosene or gunpowder for sale, it is obvious, cannot be fairly construed into a permission to manufacture or use them upon the premises, since the risks in the respective cases may

¹ See *Elliot v. Hamilton Mut. Ins. Co.*, 13 Gray (Mass.), 139; *Whitmarsh v. Conway Fire Ins. Co.*, 16 Gray (Mass.), 359. Insurance of a village "grocery" covers liquors in Upper Canada, and the non-disclosure of the fact that liquors are kept does not avoid the policy. *Nicholson v. Phoenix Ins. Co.*, U. C. (Q. B.) 17 Can. L. J. 22, 1880. And see *post*, § 239.

² [*Birmingham Fire Ins. Co. v. Kroegher*, 83 Pa. St. 64, 66.]

³ [*Beer v. Forest City Mut. Ins. Co.*, 39 Ohio St. 109. See also § 238.]

⁴ *Mead v. Northwestern Ins. Co.*, 3 Seld. (N. Y.) 530; *Westfall v. Hudson River Fire Ins. Co.*, 2 Kern. (N. Y.) 239, reversing s. c. 2 Duer (N. Y. Superior Ct.), 490.

widely differ.¹ [Permission in a policy to keep "hazardous" goods does not permit the keeping of goods especially or *extra* hazardous. It is not used in a general sense, but is a word well known to be subdivided in policies.² If a policy prohibits the keeping of gasoline or benzine but authorizes the use of gasoline gas, the latter authority does not permit the keeping of gasoline or benzine on the premises for any other purpose than the manufacture of gasoline gas.³]

§ 235. **Hazardous Goods defined.** — Under the prohibition of the storage of hazardous articles, a distinction has been taken between those articles which are deemed hazardous by reason of their greater liability to injury in case of fire, and those which increase the risk of fire; and it has been said that it is only the latter class of articles which can be reasonably regarded as coming within the prohibition, so as to avoid the policy.⁴

§ 236. **Classification of Risks; Hazardous Trades.** — If the terms of the policy classifying the risks are defined in the policy itself, this will usually control the meaning. But if at the time of issuing the policy any clause is inserted which is inconsistent with the definition, or renders it doubtful whether it ought to apply, the doubt will be resolved in favor of the insured. For example, a policy provides in writing, after a description of the premises, that they are privileged to be occupied as hide, fat-melting, slaughter, and packing houses, and stores and dwellings, *and for other extra-hazardous purposes*. In the second class of risks are included "hazardous No. 2," "extra-hazardous No. 2," "extra-hazardous No. 3," and "specially hazardous." The occupations specially privileged, such as "hide, fat-melting, slaughter, and packing houses, &c.," do not fall within any definition of "extra-hazardous," but do come within the definition of "specially hazardous," to which class distilleries belong, and the building insured was used as a dis-

¹ And see *post*, § 237.

² [Pindar v. Continental Ins. Co., 38 N. Y. 364.]

³ [Liverpool, &c. Ins. Co. v. Gunther, 116 U. S. 113, 130.]

⁴ Rathbone v. City Fire Ins. Co., 31 Conn. 193.

tillery. Upon these facts, and on the ground that where there is an inconsistency between the written and printed portions of the policy, the former must prevail, it was held that the words in the policy, "or *other* extra-hazardous purposes," must be taken to mean purposes of the same class, and those like fat-melting houses, &c., as if they read "other like purposes;" and as these were included in "specially hazardous," and distilleries were included in the same class, the use of the building as a distillery was permissible under the policy, though not included in the definition of "extra-hazardous" risks, and this term as used in the policy must be qualified accordingly as applicable to the particular case.¹

§ 237. **An additional Use of the Same or Lower Grade of those prohibited is fatal.** — But it has been held that the right to use a building for one hazardous or extra-hazardous purpose does not carry with it the right to use it for another additional and different purpose, though it be in the same class of risks. While a substitution of one use for another in the same class of risks would not increase the risk, an additional use or business would have that effect.² [If a

¹ Reynolds v. Com. Fire Ins. Co., 47 N. Y. 597. And see *post*, § 239, note.

² Lee v. Howard Fire Ins. Co., 3 Gray (Mass.), 583, 592; Wash. Mut. Ins. Co. v. Merch. & Manuf. Mut. Ins. Co., 5 Ohio St. 450, reversing s. c. 1 Handy (Cincinnati Superior Ct.), 185. But see *ante*, § 231. In the case from Massachusetts, the designated property was "a pail factory, chair-shop, saw-mill, and stores connected therewith," with a provision that the property should not be "applied or used to or for any trade, business, or vocation enumerated in the class of hazards," which was thus expounded by Bigelow, J.: "It is conceded that the premises insured, in addition to the purposes specified in the policy, were, at the time of the fire, appropriated to carrying on a grist-mill. This was a distinct use of one of the buildings insured, not assented to by the defendants, for an occupation included in the classes of hazards, annexed to the policy, as a 'special hazard.' It was therefore a violation of the express stipulation in the policy, and by its terms avoids the contract. Nor does it at all affect the result, that this additional unauthorized use of the premises was for a purpose comprehended within the same class of hazards as that which was specified in the policy, and originally covered by the insurance. The manifest purpose of this stipulation was to prevent any use of the premises for an occupation or business included in any of the classes of risks denominated 'hazardous, extra-hazardous, or special,' without the express sanction of the company in writing. It was not intended to limit the assured, in the use of his property, to the same kind of risks as those specified in the policy, and to allow him to change the mode of its occupation, or

policy on a spool-factory is to be voided by the exercise of any business denominated hazardous not specially allowed, the manufacture of excelsior (a hazardous business) will be fatal, although it appears by the evidence to be less hazardous than the making of spools, and did not increase the risk.^{1]}

§ 238. **Effect of General Description of the Stock.** — In Massachusetts² it is also held, contrary to the general current of the authorities elsewhere,³ that an insurance on a building “occupied as a provision and grocery store” becomes void by keeping certain prohibited hazardous articles, though within the usual line of goods kept in such a store, if elsewhere in the policy there is a provision against keeping any articles denominated hazardous in the classified risks.⁴ This case

appropriate the premises to additional uses of the same grade of hazards, at his pleasure. Such is not the import of the language used in the policy, nor would such a construction of it be just or reasonable. To prevent the accumulations of hazardous occupations in the same premises, without their assent, was the object which the defendants sought to accomplish by this agreement. Each distinct use of a building insured for a purpose or business of a hazardous nature might, in the opinion of the insurers, increase the risk by fire; and this might be so, whether the additional use came within the same kind of hazards as that specified in the policy, or belonged to a higher or lower class.”

¹ [Sovereign Fire Ins. Co. v. Moir, 14 Can. S. C. R. 612; 6 Russ. & Geld. (Nova Sco.) 502.]

² Whitmarsh v. Charter Oak Fire Ins. Co., 2 Allen (Mass.), 581; citing the last case and also Macomber v. Same, ante, § 233. In Whitmarsh v. Conway Fire Ins. Co., 16 Gray, 359, the policy expressly covered goods usually kept in a country store.

³ See post, § 239.

⁴ Bigelow, C. J., said in 2 Allen, 582: “The policy declared on contains a stipulation that it shall cease and be of no force or effect if the assured shall keep on the premises any of the articles, goods, wares, or merchandise denominated hazardous, or extra-hazardous, or included among the special hazards enumerated in the memorandum annexed to the policy. It is admitted that oil and sulphur, which are expressly named as hazardous articles, and matches, which are deemed extra-hazardous, and all of which subject the building and its contents to an increased rate of premium, were kept on the premises at the time of the fire. This was a clear violation of the stipulation in the contract of insurance, and put an end to it *ex vi termini*. It is urged, on behalf of the plaintiff, that the general description in the application and the policy of the purpose for which the building was occupied, ‘as a provision and grocery store,’ gives the right by implication to keep these hazardous and extra-hazardous articles, as a part of the stock appertaining to such business. But there are two difficulties in the way of adopting such an interpretation of the contract, which are insurmountable. In the first place, it militates with the clear and unambiguous terms of the agreement.

has been followed in Virginia,¹ where it was held that insurance upon a "stock of goods such as is usually kept in a grocery store" did not cover "burning fluid," that being elsewhere in the policy excepted from the risk. In Tennessee, also, the doctrine has been held; but the policy prohibited "vending," and provided that "the use of *general terms*, or anything less than a distinct specific agreement, clearly expressed and indorsed on the policy, shall not be construed as a waiver of any written or printed condition therein."² So in Kansas, where the policy provided that no excepted article should be kept, unless upon "special consent in writing indorsed on the policy, naming each article specially."³

§ 239. **What Keeping or Use avoids the Policy; General Written Description controls the Printed Clauses.** — And it

Hazardous and extra-hazardous articles are expressly prohibited, 'if not specially provided for.' In the face of this language, it is impossible to hold that a general description of the building, and the purpose for which it is occupied, will allow the assured to keep articles of a dangerous and inflammable nature, which are not necessarily comprehended within a fair and reasonable interpretation of the general words used. In the next place, we cannot know, judicially, in the absence of any proof or agreement of the parties, that such articles as oil, sulphur, and matches are usually or properly kept in stores occupied for the sale of groceries and provisions." This case may have been well decided on the failure of proof; but upon the other point it certainly gives the insurer instead of the insured the benefit of a doubt; and, if carried to its logical results, would permit insurers to take their premiums upon a building covering a stock of goods, the keeping of every article of which is fatal to the very policy which professes to insure. No one can suppose that any person seeking insurance would ever intentionally make such a contract as that, and it is quite clear that if there are any insurers who would, they ought not to receive any encouragement in a court of justice. If they would, it would be a gross fraud. If they would not, this construction needlessly makes for the parties a contract which neither intended to enter into. Suppose a building occupied as a livery-stable is insured with a prohibition of certain hazardous articles, amongst which horses, carriages, and hay are enumerated. See *ante*, § 174; *Van Schoick v. Niagara Ins. Co.*, 68 N. Y. 434; *Collins v. Farmville Ins. Co.*, 79 N. C. 279; *Washburn v. Miami, &c. Ins. Co.*, C. Ct. (Ohio), 2 Fed. Rep. 633. Such a provision against the use or keeping of hazardous articles does not apply to a condition requiring a statement of the nature of the article insured, or to a condition that in case of other insurance only a proportionate part shall be recovered, or to a condition requiring notice if the premises shall become vacant, — there being conditions having special reference to hazardous risks.

¹ *Portsmouth Ins. Co. v. Brinckley (Va.)*, 2 Ins. L. J. 842.

² *People's Ins. Co. v. Kuhn*, 12 Heisk. 515; 1 Central L. J. 214, and note by Hon. J. O. Pierce.

³ *Cobb v. Insurance Co. of N. A.*, 11 Kans. 93.

may be stated as a general proposition that where, in the designation of the subject-matter of insurance, a stock of goods, or property embarked and used in a particular trade or manufacture, or any branch of business, is stated to be insured without qualification or exception, the policy covers all such special articles of merchandise, processes, practices, subordinate trades, and manufactures as are necessarily or usually included in and incidental to the general subject-matter of insurance, notwithstanding the policy may provide, by a general printed stipulation, that if the premises shall be used for, or appropriated or applied to, the storing or vending of articles, or the carrying on of any trade, vocation, or business denominated hazardous, extra-hazardous, or enumerated in the memorandum of special rates, the policy shall be void; and such included and incidental matters are within the excepted specifications. This rule is based upon the presumed intent of the parties that the entire subject-matter as it is, and as it must necessarily exist, if it exist at all, with all its incidents and without essential changes, is to be protected,¹ and upon the further presumption that the written special description of the particular subject-matter, wherever inconsistent with special printed clauses, must control.² And this general proposition has been established and illustrated by numerous adjudged cases.³ Thus, though the trade of a carpenter is excepted

¹ *Delonguemare v. Tradesmen's Insurance Company*, 2 Hall (N. Y. Superior Ct.), 589.

² *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72; *Goss v. Citizens' Ins. Co.*, 18 La. An. 97; *Benedict v. Ocean Ins. Co.*, 31 N. Y. 389; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492; *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. St. 485; *Cushman v. North Western Ins. Co.*, 34 Me. 487; *Moore v. Protection Ins. Co.*, 29 id. 97; *Leggett v. Aetna Ins. Co.*, 10 Rich. Law (S. C.), 202; *Archer v. Merchants' Manuf. Ins. Co.*, 43 Mo. 434; *James v. Lycoming Fire Ins. Co.*, 4 Cliff. C. Ct. (Mass.) 272.

³ [A policy on a "general store" covers such quantities of gunpowder and petroleum as can be shown to be customarily kept in such store. *Barnard v. Nat. F. Ins. Co.*, 27 Mo. App. 26. In Kentucky, however, it is held that where the printed conditions exclude gunpowder, the mere fact that it is usually kept as part of such a stock as is insured, or that the agent told the insured he could keep gunpowder, cannot estop the company. The rule against parol evidence applies. *Western Ass. Co. v. Rector*, 85 Ky. 294.]

as a hazardous trade, yet as in the manufacture of china a carpenter is usually employed in the factory, and works with bench and tools in making shelves, mouldings, boxes, and racks, in furtherance of the general purpose of the business, such employment will not avoid a policy issued "on buildings occupied as a china factory, and on stock finished and unfinished therein." Nor is the employment of a carpenter for making repairs "carrying on the trade" of a carpenter.¹ But a keeping for sale, as of saltpetre by a butcher, may be fatal, while the keeping for use is permissible.²

So an insurance of a "printing business" includes all that is essential in conducting such business; and if camphene is a customary and necessary article used in such business, the keeping of that article is permissible under the policy, though it state that "the company will not be liable for a loss by fire occasioned by camphene or other inflammable fluid," and it appear that the fire was occasioned by the accidental dropping of a match into a pan of camphene while in use.³ And the same is true under a like insurance and a similar cause of the loss, where the policy provided that "camphene, spirit, gas, or burning fluid cannot be used in the building where insurance is effected, unless permission for such use be indorsed in writing on the policy, and is then to be charged an extra premium," though no such permission was indorsed and no extra premium paid. The use of camphene thus prohibited was held to be its use for the purposes of illumination, and not a use in the processes of the business.⁴ To take benzine upon the premises for the

¹ *Delonguemare v. Tradesmen's Ins. Co.*, 2 Hall (N. Y.), 589; *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459; *Sims v. State Ins. Co.*, 47 Mo. 54; *Westchester Fire Ins. Co. v. Foster*, 8 Ins. L. J. 596.

² *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313.

³ *Harper v. City Ins. Co.*, 22 N. Y. 441 (see *post*, § 415), affirming s. c. 1 Bosw. (N. Y. Superior Ct.) 520; *Steinbach v. Lafayette Fire Ins. Co.*, 54 N. Y. 90, 95; *Hall v. Ins. Co. of N. A.*, 58 id. 292.

⁴ *Harper v. Albany Mut. Ins. Co.*, 17 N. Y. 194. The keeping of camphene for sale was also prohibited in the policy. *Ditwiller v. Phoenix Fire Ins. Co.*, 7 N. Y. (Sup. Ct.) 530. But in *Putnam v. Com. Ins. Co.*, C. Ct. (N. Y.), 23 Alb. L. J. 239, a like prohibition of keeping or using naphtha was held to admit of its use for illumination. See also *Buchanan v. Exchange Ins. Co.*, 61 N. Y. 26; *Wheeler v. American, &c. Ins. Co.*, Ct. of App. (Mo.), 8 Ins. L. J. 318.

purpose of cleaning the machinery is not "to keep and have" it there, which words are intended to prevent permanent or habitual storage of the articles.¹ So "stock in trade" of a furniture dealer covers paints, oils, and varnishes used to finish, though in answer to an inquiry it was stated that no explosive or highly inflammable matter was kept on the premises.² So a policy issued upon "stock as rope manufactures" or "flax factory" covers the business of rope-making, though that business is excluded as specially hazardous.³ But a "store house" cannot be used for hackling hemp, and spinning it into rope yarn.⁴

So insurance "as a manufacturer of brass clock works" permits the use of all such articles as are ordinarily employed in that manufacture, and the keeping them on hand, and even the making them for that purpose, if such be the ordinary course of the business, although the use or keeping of such articles be prohibited by the printed terms of the policy as extra-hazardous.⁵ So where the written portion of the policy insured a steam-engine, but the printed condition excepted losses "caused by or consequent on the bursting or collapsing of a steam-boiler or steam-pump," it was

¹ Mears v. Humboldt Ins. Co. (Pa.), 9 Ins. L. J. 139. In Morse v. Buffalo Fire & Marine Insurance Company the use or keeping of "camphene, spirit, gas, naphtha, benzine or benzole, chemical, crude, or refined coal or earth oils," was prohibited; and it was held that, applying the maxim *noscitur a sociis*, only those refined oils that were inflammable, like naphtha, &c., and equally dangerous, were prohibited, and that kerosene, not being of such a dangerous character, was permitted. Whether a given article not specified in the policy is within the scope of the term "inflammable" or "explosive," or has any other special quality, is for the jury. Willis v. Germania, &c. Ins. Co., 79 N. C. 285; Wood v. North Western Ins. Co., 46 N. Y. 421; Putnam v. Com. Ins. Co., C. Ct. (N. Y.), 23 Alb. L. J. 239; Hicks v. Empire Ins. Co. (Mo.), St. Louis Ct. of App., 8 Ins. L. J. 319. So if the place be a "building," or the process a "manufacturing," Stovall v. Fireman's Ins. Co. (Md.), Sup. Ct. Balt., 9 Ins. L. J. 160. A building fifty feet from another cannot be said to be "contiguous." The term implies close proximity. Arkell v. Commerce Ins. Co., 69 N. Y. 191.

² Haley v. Dorchester Fire Ins. Co., 12 Gray (Mass.), 546.

³ Wall v. Howard Ins. Co., 14 Barb. (N. Y.) 383. It seems that "hackling hemp and spinning it" is not "rope-making." Ibid.; Aurora Fire Ins. Co. v. Eddy, 55 Ill. 213, 222.

⁴ Wall v. East River Ins. Co., 7 N. Y. 370.

⁵ Bryant v. Poughkeepsie Mut. Ins. Co., 21 Barb. (N. Y.) 154; s. c. 17 N. Y. 200.

held that, there being a repugnancy between the written and printed portions of the policy, the written portion must prevail.¹(a)

So "goods usually kept in a country store" covers clean white cotton rags, it being shown that such rags usually form part of the stock of country stores, though in the application, which was made part of the contract, the question whether "cotton or woollen waste or rags" were kept in or near the premises was answered in the negative.²(b) So a policy on "such goods as are kept in a general retail store,"³ or "the usual variety of a country store,"⁴ covers such an

¹ *Hayward v. North Western Ins. Co.*, 19 Abb. Pr. (N. Y.) 116. But see *Hayward v. Liverpool, &c. Ins. Co.*, 2 Abb. App. Dec. 349; *Evans v. Columbian Ins. Co.*, 44 N. Y. 146.

² *Elliot v. Hamilton Mut. Ins. Co.*, 13 Gray (Mass.), 139. This case, however, was rather one of representation, and turned upon the point that "cotton or woollen waste or rags" referred to waste or oily rags, such as are easily inflammable, rather than clean white rags.

³ *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492; *ante*, § 233.

⁴ *Whitmarsh v. Conway Fire Ins. Co.*, 16 Gray (Mass.), 359.

(a) If benzine is insured in writing in a policy, as part of a merchant's stock, such written clause prevails over a printed clause in the policy forbidding it to be kept. *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54; *Russell v. Manufacturers' & Builders' F. Ins. Co.*, 50 Minn. 409; see also *Faust v. American F. Ins. Co.*, 91 Wis. 158; *Boyd v. Mississippi Home Ins. Co.*, 75 Miss. 47; *Maril v. Conn. F. Ins. Co.*, 95 Ga. 604; *supra*, § 144 D, and note (a).

(b) So under a policy upon goods "such as are usually kept in country stores," and providing in print that it shall be void if benzine and other inflammable substances are kept without consent, the insured may prove that his goods were such as are usual in country stores. *Tubb v. Liverpool, &c. Ins. Co.*, 106 Ala. 651.

The knowledge and assent of the insurer's local agent as to the erection of a gasoline plant on the insured property after the delivery of the policy, and the failure of the insurer to cancel the policy, do not limit the insurer's rights to insist upon a promissory warranty as to gasoline. *West End Hotel & Land Co. v. American F. Ins. Co.*, 74 Fed. Rep. 114; see *Laclede Fire-Brick Manuf. Co. v. Hartford, &c. Ins. Co.*, 60 id. 351. So the mere knowledge of the insurer that a promissory warranty that a clear space of one hundred feet shall be maintained between the insured property and any woodworking or manufacturing establishment, is not observed, and its failure to object thereto, do not avoid a forfeiture for this cause. *Petit v. German Ins. Co.*, 29 Ins. L. J. 255; see *Michigan Shingle Co. v. State Inv. & Ins. Co.*, 94 Mich. 389; *Collins v. North British Merc. Ins. Co. (Mich.)*, 76 N. W. 487; *Merchants' Ins. Co. v. New Mexico Lumber Co.*, 10 Col. App. 223; *Liverpool, &c. Ins. Co. v. Farnsworth Lumber Co.*, 72 Miss. 555; *McCormick v. Royal Ins. Co.*, 163 Penn. St. 184; *James v. Ins. Co. of North America*, 90 Tenn. 604.

amount of gunpowder, matches, or other hazardous articles as is usually kept for sale in such a store, though excepted by the printed condition of the policy from being deposited, stored, or kept. [Evidence of the usage of merchants may be introduced to show that gunpowder comes within the fair and understood meaning of the words used to describe the risk as "general stock of merchandise," or "dry goods and groceries." ¹] "Oils and other spirituous liquors" may be kept by a "grocer," the business of a grocer not being specified in the memorandum of excepted risks, though the specific articles are. ² So a policy on a stock of "dry goods" covers cotton in bales, if ordinarily a portion of such a stock, though the latter are enumerated as extra-hazardous. ³ And it seems that a housekeeper may keep such articles as are incidental to house-keeping. ⁴ But gunpowder is not included in a "general stock of iron and hardware," ⁵ nor is "hat bleaching" any part of the dry-goods business. ⁶ Insurance on a "steam-flouring mill" covers and permits a corn-mill in connection with a kiln for drying corn meal, if they are a usual or appropriate part of the business insured. ⁷ [When a policy insured against fire on a photographer's stock, it was held to cover such materials as were necessarily and ordinarily used in that business, although by the printed clause of the policy the keeping or use of such materials was prohibited. ⁸] But the introduction of coopering into an unused flour-mill and a prosecution for months of the business are an appropriation to another purpose, and, if it increases the risk, avoids the policy. ⁹ Nor does the insurance of a stock of "cabinet wares" permit the use of

¹ [Liverpool, &c. Ins. Co. v. Van Os, 63 Miss. 431, 442.]

² New York Equitable Ins. Co. v. Langdon, 6 Wend. (N. Y.) 623.

³ Moore v. Prot. Ins. Co., 29 Me. 97; Germania Fire Ins. Co. v. Francis, 52 Miss. 457; Collins v. Farmville Ins. Co. (N. C.), 8 Ins. L. J. 453.

⁴ Phoenix Ins. Co. v. Slaughter, 12 Wall. (U. S.) 404; Aurora Fire Ins. Co. v. Eddy, 55 Ill. 222; Reaper City Fire Ins. Co. v. Jones, 62 Ill. 458.

⁵ Mason v. Hartford Fire Ins. Co., 29 U. C. (Q. B.) 585.

⁶ Merrick v. Provincial Ins. Co., 14 U. C. (Q. B.) 439.

⁷ Wash. Mut. Ins. Co. v. Merch. & Manuf. Ins. Co., 5 Ohio St. 450.

⁸ [Hall v. Ins. Co. of N. A., 58 N. Y. 292, 294.]

⁹ Harris v. Columbiana Mut. Ins. Co., 4 Ohio St. 285.

the premises in putting chairs together, the parts of which are elsewhere manufactured, nor the use of alcohol, paint, and varnish in the process, the policy prohibiting any trade or occupation and the keeping of such articles. Such a policy covers only finished articles, and not at all any process of manufacture or completion.¹ Making brooms in a building does not constitute it a manufactory, nor does the grinding of corn in it necessarily make it a mill. The words are to be taken in their common signification as describing a certain kind of property, commonly regarded as a mill or manufactory.² So where the condition was that "applications for insurance on manufactories where steam is used must be approved at the head office," it was held not to apply to a vacant distillery, which it was not contemplated to put in operation.³ And, generally, if the use, or trade, or article kept on storage or for sale, is not incidental to that which is the subject-matter of insurance, the policy not only does not cover it, but is void.⁴

[§ 239 A. **Gasoline; Petroleum; Gin; Turpentine.** — Lighting with gasoline is not devoting the premises to a more hazardous *business*.⁵ A prohibition against keeping petroleum, or "refined coal and earth oils" is broken by keeping gasoline.⁶ (a)

¹ Appleby v. Astor Ins. Co., 54 N. Y. 253.

² Franklin Fire Ins. Co. v. Brock, 57 Pa. St. 74.

³ Rowe v. London, &c. Ins. Co., 12 Grant's Ch. (N. C.) 311.

⁴ As to property covered by policy, see *post*, § 420.

⁵ [Mut. Fire Ins. Co. v. Coatesville Shoe Factory, 80 Pa. St. 407.]

⁶ [King's Co. Fire Ins. Co. v. Swigert, 11 Brad. 590.]

(a) In the clause of a policy providing that it shall be void if gasoline "be kept, used, or allowed" on the premises, the word "allowed" means "allowed to be kept or used." London & L. Fire Ins. Co. v. Fischer, 92 Fed. Rep. 500, 502; see *McFarland v. St. Paul F. & Ins. Co.*, 46 Minn. 519. The policy is avoided for this cause when the fire is caused by gasoline kept by a third person in the insured building with the insured's express or implied consent. *German F. Ins. Co. v. Commissioners*,

54 Kansas, 732. A condition of a fire policy upon a furniture factory against benzine being kept, used, or allowed on the premises is not broken by such keeping and use there of benzine as is necessary and customary in the business of manufacturing furniture, or by the occasional use of it in small quantities. *Faust v. American F. Ins. Co.*, 91 Wis. 158; *Davis v. Pioneer Furniture Co.*, 102 Wis. 394; *Lancaster Silver Plate Co. v. National F. Ins. Co.*, 170 Penn. St. 151; *Wheeler v. Traders' Ins. Co.*,

Although among the articles forbidden by a policy on a "manufacturing establishment," if petroleum is kept and used to lubricate the machinery in a reasonable and proper manner, and it is shown to be an appropriate and customary article for such purposes, the policy is not broken.¹ When the assured supposed that he was using "lard and sperm oil" as per the policy, the mere fact that some petroleum was used in compounding it unknown to him would not be a breach of the condition² allowing only lard and sperm oil as lubricators, if in fact the petroleum mixture was equally

¹ [Carlin v. West Ass. Co., 57 Md. 515, 529.]

² [Copp v. German American Ins. Co., 51 Wis. 637, 641.]

62 N. H. 450; Ran v. Westchester F. Ins. Co., 55 N. Y. S. 459; Hanover F. Ins. Co. v. Stoddard, 52 Neb. 745; Bentley v. Lumbermen's Ins. Co., 191 Penn. St. 276. So insurance upon an uncompleted building authorizes its use in any common business to which its construction is adapted, and a policy which merely prohibits the storing of dangerous articles therein does not prohibit keeping them for sale in such business. Renshaw v. Missouri State Mut. F. & M. Ins. Co., 103 Mo. 595, 605; Phoenix Ins. Co. v. Flemming, 65 Ark. 541. The single negligent act of building a stove fire by adding a half-pint of kerosene oil, whereby the building is destroyed, is not an "increase of hazard." Angier v. Western Ass. Co., 10 So. Dak. 82; 66 Am. St. Rep. 684, 691, and extended note. See White v. Royal Ins. Co., 149 N. Y. 485. The word "kept," as used in a policy of insurance which provides that it shall be void if certain oils and burning fluids shall be kept on the premises, implies a use of the premises as a place of deposit for the prohibited articles for a considerable time, and where, while a naphtha torch was being used to burn off the old paint preparatory to repainting, the building caught fire and was entirely consumed, the question was whether such a change of use, increasing the risk with the agency and consent

of the insured, was an alteration of "the situation or circumstances affecting the risk" within the meaning of the policy, it was held, that, as the change had existed continuously during the working hours of every day for nearly a month, and the work was not nearly done when it was interrupted by fire, the change of condition was so long continued as to amount to a change in "the situation or circumstances affecting the risk." First Congregational Church v. Holyoke Mut. F. Ins. Co., 158 Mass. 475. See Smith v. German Ins. Co., 107 Mich. 270. As to restrictions upon the use of "dangerous or inflammable substances," such as kerosene or chemical oils, camphene, &c., see also Lancaster Silver Plate Co. v. Manchester F. Ass. Co., 170 Penn. St. 166; Renshaw v. Missouri State Mut. F. & M. Ins. Co., 103 Mo. 595; 23 Am. St. Rep. 904, and note; Maril v. Conn. F. Ins. Co., 95 Ga. 604; Grand Rapids Hydraulic Co. v. American F. Ins. Co., 93 Mich. 396; Pool v. Milwaukee Mechanics' Ins. Co., 91 Wis. 530; Snyder v. Dwelling-House Ins. Co., 59 N. J. L. 544; 59 Am. St. Rep. 625, and note. As to portable engines, see Farmers' Mut. F. Ins. Co. v. Schaeffer, 82 Md. 377; Morris v. Farmers' Mut. F. Ins. Co., 63 Minn. 420; Davis v. West-eru Home Ins. Co., 81 Iowa, 496.

as good and safe as pure lard and sperm oil. Where the policy grants the use of kerosene for lamps to be filled by daylight only, the drawing of the oil by lamplight to loan to a neighbor, causing an explosion, avoids the policy.¹ Where a policy provided that kerosene might be used for light in dwellings, and kept for sale in stores, and where it appeared that a kerosene lamp was kept burning in the store during the night, and that the clerk and proprietor slept in a back room of the store, the policy was held void, the loss being occasioned by the said lamp.² The said use of the store did not constitute it a dwelling so as to escape the clause of the policy prohibiting the use of kerosene in the store. The court will not judicially recognize that gin and turpentine are "inflammable liquids."³

[§ 239 B. **Gunpowder; Fireworks, &c.** — Where the insured is allowed to keep only seventy-five pounds of gunpowder for sale, the mere casual or accidental presence of more will not avoid the policy.⁴ Whether "gunpowder" includes blasting powder, *quære*.⁵ A policy which forbids nitroglycerine, excludes dynamite and giant powder.⁶ Where the policy insured "goods and groceries" and provided that no gunpowder should be kept "in or upon the premises" insured, and that no camphene, or burning fluid or other inflammable liquids should "be kept in any building hereafter insured in this company," it was held that "premises" and "building" did not refer to "goods and groceries" but to real estate, and if gunpowder and so forth were kept on premises not insured the policy on the "goods" was not affected.⁷ The keeping of fireworks is not a breach of the condition against keeping gunpowder on the premises.⁸

¹ [Gunther v. Liverpool, &c. Ins. Co., 34 Fed. Rep. 501 (N. Y.), 1888.]

² [Cerf v. Home Ins. Co., 44 Cal. 320, 322.]

³ [Mosley v. Vt. Mut. Fire Ins. Co., 55 Vt. 142.]

⁴ [Insurance Co. v. Hughes, 10 Lea (Tenn.), 461. The proof was conflicting whether there was a little more or a little less than seventy-five pounds of powder in the store. It does not appear that the powder occasioned the fire.]

⁵ [Insurance Co. v. Hughes, 10 Lea (Tenn.), 461, 467-468.]

⁶ [Sperry v. Springfield Fire & Mar. Ins. Co., 26 Fed. Rep. 234 (Col.), 1886.]

⁷ [Mosley v. Vt. Mut. Fire Ins. Co., 55 Vt. 142.]

⁸ [Tischler v. Cal. Farmers' Mut. Fire Ins. Co., 66 Cal. 178.]

Evidence is admissible to show that fireworks constitute an ordinary, usual, and recognized portion of a stock of fancy goods and Yankee notions. A policy insuring such a stock is not avoided by keeping fireworks although they are classed as "specially hazardous," and it was specified that this class to be covered must be specially written in the policy.¹ Fireworks are not included in "family groceries, wines, liquors, tobacco, and cigars."²]

§ 240. **Working of Carpenters; Repairs.** — Upon the same general principles, when, from the character of the building insured, and the use made of it, it is necessary to have workmen constantly engaged in repairing, in order to keep it in proper condition for the business done therein, the employment of such workmen is not a breach of the condition that "working of carpenters," &c., altering or repairing, will vitiate the policy. (a) Such condition has for its object to prohibit such hazardous use as is generally denominated a "builder's risk," which arises from placing the building in the possession or under the control of workmen for alteration or repairs, but does not refer to such indispensable repairs as are necessary to the proper conduct of the busi-

¹ [Barnum v. Merchants' Fire Ins. Co., 97 N. Y. 188.]

² [Georgia Home Ins. Co. v. Jacobs, 56 Tex. 366.]

(a) Alterations and repairs in a building, to be material to the risk, must be of a permanent nature. *Adair v. Southern Mut. Ins. Co.*, 107 Ga. 297. In *Imperial F. Ins. Co. v. Coos County*, 151 U. S. 452, a policy which contained the express provision that it should be void if "mechanics are employed in building, altering, or repairing the premises" without consent, was held avoided by the employment of mechanics for six weeks in basement repairs, which were fully completed before the fire, irrespective of the question whether there was an increase of risk. See also *Hill v. Middlesex Mut. Ass. Co.*, 174 Mass. 542. As to repairs and alterations, see *London Ass. Co. v. Drennen*, 116 U. S. 461; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387; *First Cong. Church v.*

Holyoke M. F. Ins. Co., 158 Mass. 475; *Stauffer v. Manheim M. F. Ins. Co.*, 150 Penn. St. 531; *Newport Ins. Co. v. Home Ins. Co.*, 163 N. Y. 237; *Mechanics' Ins. Co. v. Hodge*, 149 Ill. 298; *Firemen's Ins. Co. v. Appleton Paper Co.*, 161 Ill. 9; *Manufacturers' Ins. Co. v. Armstrong*, 145 Ill. 469; *Schaeffer v. Farmers' Ins. Co.*, 80 Md. 563; *Monteleone v. Royal Ins. Co.*, 47 La. An. 1563; *Limb- burg v. German F. Ins. Co.*, 90 Iowa, 709; *Phenix Ins. Co. v. Coomes (Ky.)*, 20 S. W. 900. Consent to vacancy does not include consent to repairs. *Hill v. Commercial Union Ins. Co.*, 164 Mass. 406. A tenant's insurance of goods by a policy which allows limited repairs to realty does not apply to the owner's repairs on the building. *Mechanics' Ins. Co. v. Hodge*, 149 Ill. 298.

ness to which the building is appropriated.¹ [Employing carpenters to make extensive alterations is, however, a breach of condition.²]

§ 241. **Use means Habitual Use.** — Use for any purpose prohibited means habitual use.³ (a) Insurance on a building where “no fire” is kept and no hazardous goods are classed is as if the clause read “usually” kept and deposited.⁴ The introduction of a tar barrel, and lighting a fire for the purpose of repairing the building insured, is not in contravention of the terms of a policy which provides that fire shall not be kept nor hazardous goods deposited on the premises.⁵ Nor is insurance upon a “kiln for drying corn in use” vitiated by the fact that the insured in a single instance allowed the cargo of a vessel laden with bark, which had sunk near by, to be dried at the kiln. It is not a change of business in the sense of the terms of the policy, which means permanent change.⁶ Repairing the building insured by the ordinary methods, and occupying it for that purpose, is not an appropriation, use, or application thereof for carrying on a

¹ *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102. See also *ante*, § 224; *post*, § 241.

² [*Mack v. Rochester German Ins. Co.*, 106 N. Y. 560.]

³ [*Insurance Co. v. Hughes*, 10 Lea (Tenn.), 461; *Humboldt Fire Ins. Co. v. Mears*, 1 Pennypacker, 513. But a single occasion of use is sufficient if loss thereby results. When a policy excepted liability for loss occasioned by kerosene, &c. oils, and the barn was destroyed by carrying a lamp so filled therein, it was held that the company was not liable. *Matson v. Farm Buildings Insurance Co.*, 73 N. Y. 310, 313. Whether “keep or use” means on a single occasion or continuously, depends on the circumstances. A vial of naphtha in the pocket of one working in the mill, or a drop taken there as medicine, might not create any appreciable hazard, but a keeping or use which involves the mill in substantial danger terminates the risk. *Wheeler v. Insurance Co.*, 62 N. H. 326. In this case the insured bought what he supposed was benzine to kill moths. It was really naphtha. He sprinkled it on the wool in his mill, and a few hours after a fire broke out. The policy was held void.]

⁴ *Dobson v. Sotheby*, 1 Moo. & Mal. 90; *Barrett v. Jermy*, 3 Wels., Hurl. & Gor. (Exch.) 535; *Leggett v. Aetna Ins. Co.*, 10 Rich. Law (S. C.), 202; *Insurance Co. of N. A. v. McDowell*, 50 Ill. 120.

⁵ *Dobson v. Sotheby*, 1 Moo. & Mal. 90; s. c. 22 E. C. L. 481.

⁶ *Shaw v. Robberds*, 6 Adol. & Ell. 75; s. c. 33 E. C. L. 12.

(a) As to increase of risk by the church to other uses, see *School District v. German Ins. Co.*, 7 So. Dak. 458.

trade or business of house building or repairing.¹ Nor is the making a fire therein for the purpose of extracting fat from spoiled meat.² The mixing and keeping of paints in the barn, by the insured, for the purpose of painting his house, is an ordinary and permissible use of the barn, although it is described as used for "hay, straw, grain unthrashed, stabling, and shelter."³ In an insurance upon a house in process of building, a statement, in reply to an inquiry, that there are no stoves in it, means that no stove is to be habitually kept and used in it as stoves are ordinarily used in a dwelling-house. The use of a stove for a few days subsequent to the effecting of the insurance, and for a purpose connected with the finishing of it, is no violation of the warranty,⁴ or of a condition against alteration in use.⁵ The casual use of camphene and friction-matches by workmen employed about the premises, without the knowledge of the insured and contrary to his orders, is no violation of a proviso that they shall not be kept, used, or sold. A use to work forfeiture must be a use known to, and permitted by, the insured.⁶ The occasional use of articles denominated hazardous, or the occupation of the premises insured for purposes called hazardous, in the conditions annexed to a policy, will not avoid the policy if such use and occupation appertain to the general subject-matter of the risk.⁷

§ 242. **Storing.** — "Storing" has been defined to mean "keeping for safe custody, to be delivered out again in the same condition, substantially, as when received," and to apply only when the storing or safe-keeping is for trading purposes, and is the sole or principal object of the deposit,

¹ O'Niel v. Buffalo Fire Ins. Co., 3 Comst. (N. Y.) 122; Grant v. Howard, 5 Hill (N. Y.), 10.

² Gates v. Madison County Mut. Ins. Co., 5 N. Y. 469.

³ Billings v. Tolland County Mut. Fire Ins. Co., 20 Conn. 139.

⁴ Williams v. New England Mut. Fire Ins. Co., 31 Me. 219; Barrett v. Jermy, 3 Wels., Hurl. & Gor. (Exch.) 535.

⁵ Troy Fire Ins. Co. v. Carpenter, 4 Wis. 20. And see *post*, § 255.

⁶ Farmers' & Mechanics' Ins. Co. v. Simmons, 30 Pa. St. 299; White v. Mutual Fire Ins. Co., 8 Gray (Mass.), 566; Sanford v. Mech. Mut. Fire Ins. Co., 12 Cush. (Mass.) 541.

⁷ Merch. & Manuf. Ins. Co. v. Washington Ins. Co., 1 Handy (Ohio), 181.

and not when it is merely incidental, and the keeping is only for the purpose of consumption; as when kerosene is kept for the purpose of illumination, or saltpetre for the purpose of curing meats. Wine sent to a warehouse to be kept and returned when called for is "stored;" but wine kept in one's cellar or garret, to be sold or consumed as occasion may require, is not. Thus, a grocer, insured as such, may keep wine and oil for sale, although they are classed as hazardous articles; and by the terms of the policy hazardous articles are not to be "stored."¹ (a) [When a policy prohibited the *storing* of oil, &c., it was held that a keeping of the same in a retail store for the purpose of

¹ Langdon v. N. Y. Equitable Fire Ins. Co., 1 Hall (N. Y.), 226; s. c. 6 Wend (N. Y.) 623; Phoenix Ins. Co. v. Taylor, 5 Minn. 492; Mayor, &c. v. Hamilton Ins. Co., 10 Bosw. (N. Y.) 537; Rafferty v. N. B. Fire Ins. Co., 3 Harr. (N. J.), 480; Williams v. Mechanics', &c. Ins. Co., 54 N. Y. 577; Williams v. Fireman's Fund Ins. Co., id. 569; Bayly v. London, &c. Ins. Co., C. Ct. (La.), 4 Ins. L. J. 503; Buchanan v. Exchange Fire Ins. Co., 61 N. Y. 26; Com. Ins. Co. v. Mehlman, 48 Ill. 313.

(a) Where, under a policy, with permission to complete, on a block of unfinished buildings which was built for stores below and dwellings above, one of the stores was occupied after completion by a retail grocer, who kept as part of his stock gasoline and coal oil, and a violent explosion having demolished the building, and killed the grocer and several members of his family, the evidence showed that shortly before the explosion there was a bright light and probably fire in the store, and the defence was that keeping gasoline voided the policy under the condition which excluded the storing of hazardous and extra-hazardous articles, it was held that "keeping" is not "storing;" that a contract of insurance upon a building made before its completion authorizes the use of the building in any common business to which its construction is adapted, and that when the contract prohibits storing hazardous articles, it does not prohibit keeping them for sale in such business. Ren-

shaw v. Missouri State Mut. F. & M. Ins. Co., 103 Mo. 595. So of the keeping of dynamite. Phoenix Ins. Co. v. Walters (Ind. App.), 56 N. E. 257. Under a policy providing that coal oil not exceeding five barrels, and gunpowder not exceeding twenty-five pounds,*and other merchandise, "not more hazardous," usual to general stocks of merchandise, might be kept, the keeping of three and a half boxes of squibs containing about a pound of powder does not render the policy void. Mechanics' & Traders' Ins. Co. v. Floyd (Ky.), 28 Ins. L. J. 335. Where the insured having purchased and stored a lot of fireworks in his house for use on the following day, which was the Fourth of July, they took fire and caused the damage, the policy, which provided that it should be void if the hazard were incurred with the knowledge of the insured, or if fireworks, among other things, were allowed on the premises, was held to be avoided. Heron v. Phoenix Mut. F. Ins. Co., 180 Penn. St. 257.

replenishing stock, from time to time, and in quantities not unusually large, did not vitiate the policy.¹ It is the appropriation to the business of storing that is prohibited in a policy that inhibits the use of the insured premises for the purpose of storing and keeping certain specified articles, while insuring a stock of goods in which those articles are ordinarily found. And it seems that raw material used in a manufacture, and brought into and kept in the room where it is to be manufactured, is not stored therein in the sense of the policy which prohibits the use of any part of the premises for storing such articles.² So, if the material has been casually and temporarily left in a room, without any purpose to appropriate that room to the use of keeping and storing it.³ To use for "keeping and storing" is to appropriate the premises to that use as a principal use, and not incidentally and for some other purpose to which the keeping and storing is necessarily incidental. Articles kept in a store are kept and stored for sale, but the use of the building is for selling, and not for keeping and storing.⁴ Oil, turpentine, and paint may be kept and stored in a building in process of erection on which they are to be used, but the building can in no proper sense be said to be used for keeping and storing them.⁵ Gunpowder being one of the prohibited articles, it appeared that the insured had kept it for sale in his general stock. At the time of insurance he had some still remaining on hand, but it was not offered for sale after the policy issued; and it was held that this was neither a storing nor a keeping for sale.⁶ So where a party insured a building which had been used for dressing flax, but before effecting insurance the machinery had been removed from

¹ [Langdon v. N. Y. Eq. Ins. Co., 1 Hall (N. Y.), 226, 236.]

² Vogel v. People's Mut. Fire Ins. Co., 9 Gray (Mass.), 23.

³ Hynds v. Schenectady County Mut. Ins. Co., 16 Barb. (N. Y.) 119; s. c. affirmed, 11 N. Y. 554; Williams v. People's Ins. Co., 57 id. 274. See also People's Ins. Co. v. Kuhn, 12 Heisk. (Tenn.) 515; s. c. 1 Cent. L. J. 214 and note.

⁴ Moore v. Prot. Ins. Co., 29 Me. 97; Leggett v. Aetna Ins. Co., 10 Rich. Law (S. C.), 202; Phoenix Ins. Co. v. Taylor, 5 Minn. 492.

⁵ O'Niel v. Buffalo Fire Ins. Co., 3 Comst. (N. Y.) 122.

⁶ Protection Ins. Co. v. Harner, 2 Ohio St. (22 Ohio) 452.

the building, though some unbroken flax — a prohibited article — remained in one corner of a room till the time of the fire, it was held that this did not constitute a use of the building for the purpose of storing the flax, there being no intention of having it regularly stored or kept there except temporarily.¹ In *Dobson v. Sotheby*² the language of the policy provides against the use of the buildings to “store or warehouse” any hazardous goods, and it was held that the introduction of a barrel of tar and its use in repairing the building was no violation of the conditions of the policy. But the supreme court of Massachusetts has repeatedly taken it for granted that the keeping of an article for sale in a general stock was an appropriation, application, and use of the premises for the purpose of keeping and storing of the particular article.³ In neither case, however, was the point discussed or raised, and the cases are certainly counter to the authorities where the point has been deliberately made. So the introduction of the prohibited article for a special purpose, even though that purpose be the destruction of the building insured, is not a “storing” within the meaning of the policy; as where gunpowder is introduced into a building for the purpose of blowing it up in order to stay the progress of a conflagration.⁴ But under a provision that the policy should be void if there should be at any time more than twenty-five pounds of powder on the premises, the placing of more than that upon the premises to await shipment, expected to be in a day or two, with the assent of the insured, was held to be a violation of the condition.⁵ A general prohibition of a particular article is sometimes modified by a permission to keep a certain amount of it.⁶ [When the company knows that the premises may be used for storing

¹ *Hynds v. Schenectady County Mnt. Ins. Co.*, 16 Barb. (N. Y.) 119; s. c. affirmed, 11 N. Y. 554.

² 1 Moo. & Mal. 90.

³ *Whitmarsh v. Charter Oak Fire Ins. Co.*, 2 Allen (Mass.), 581; *ante*, § 238; *Macomber v. Howard Fire Ins. Co.*, 7 Gray (Mass.), 257; *ante*, § 234; *Lee v. Howard Fire Ins. Co.*, 3 Gray (Mass.), 583; *ante*, § 237.

⁴ *City Fire Ins. Co. v. Corlies*, 21 Wend. (N. Y.) 367.

⁵ *Faulkner v. Central Fire Ins. Co.*, 1 Kerr (N. B.), 279.

⁶ *Bowman v. Pacific Ins. Co.*, 27 Mo. 152.

cotton, and the policy provides that the rate may be changed if the building is used as a storehouse, the storing of cotton will not avoid the policy.¹

§ 243. **Keeping; Premises.** — A very nice point was made and sustained by the Supreme Court of South Carolina in a case where the policy provided that "the keeping of gunpowder for sale or on storage upon or in the premises insured, should render the policy void." The insurance was upon "the stock of goods and merchandise contained in the applicant's store," a part of which consisted of gunpowder. But it was contended, and so held, that the word "premises" referred to buildings insured; and as there was no insurance upon the building, the gunpowder was not kept "upon or in the premises insured," within the meaning of the stipulation.² And upon the same principle a false representation as to occupancy of a building not itself insured was held immaterial.³ So a statement that the title of the insured was a "fee-simple," was held to have no application to personal property insured.⁴ So where property situated in a certain building was stated to be unincumbered, the statement was held to apply to the property insured, and not to the building in which it was situated.⁵ So a prohibition of "sale, conveyance, or change of title of the property insured" refers only to the realty.⁶ But "premises" has been very properly held to cover a ship insured, excluding the risk of gunpowder.⁷

¹ [Steers v. Insurance Co., 38 La. An. 952.]

² Leggett v. Aetna Ins. Co., 10 Rich. Law (S. C.), 202; *post*, § 367.

³ Howard Fire & Mar. Ins. Co. v. Cornick, 24 Ill. 455. But see Wilson v. Herkimer, &c. Ins. Co., 6 N. Y. 53, doubting Trench v. Chenango, &c. Ins. Co., 7 Hill (N. Y.), 122. In Phoenix Ins. Co. v. Slaughter, 12 Wall. (U. S.) 404, where the policy prohibited "gunpowder to be kept on the premises, and camphene, &c., to be kept for sale, stored, or used on the premises in quantities exceeding one barrel," it was held that as there was only a comma after the word "premises," where it first occurs, instead of a semicolon, the clause restricting quantity applied to gunpowder as well as to camphene.

⁴ Butler v. Standard Fire Ins. Co., 4 Ont. App. R. 391.

⁵ Ashford v. Victoria Ins. Co., 20 U. C. (C. P.) 434.

⁶ Commercial Ins. Co. v. Spankneble, 52 Ill. 53.

⁷ Beacon, &c. Ins. Co. v. Gibb, 13 (L. C.) Dec. des Trib. 81. See also *ante*, § 228.

§ 244. **Change in Surrounding Circumstances.** — Where parties have entered into an agreement, nothing beyond the terms of the agreement can be required of either party except good faith. And if a change in the use of the premises actually insured will not work a forfeiture, *a fortiori* a change in the use of adjoining premises will not.¹ If there be no want of good faith in bringing about or permitting any change increasing the risk, it is immaterial whether the change causes the loss. But if there be bad faith, and the loss is chargeable to the act done or permitted, then it becomes a defence to the action to recover the loss.² Where a

¹ *Western Farmers' Mut. Ins. Co. v. Miller*, 1 Handy (Superior Ct., Cincinnati), 325 ; *ante*, § 225 ; *post*, § 259.

² The grounds upon which this principle rests are thus stated in *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y. Superior Ct.), 632 : "The contract of insurance has its foundation in the mutual good faith of the parties. If the assured violates that good faith in any circumstance entering into the creation of the contract, it is no doubt void. But if, subsequently to its formation, he acts with fraud or gross negligence, or in bad faith, with respect to the subject-matter insured, his rights under the contract are not impaired unless the loss which he seeks to recover is the result of his own misconduct. It is a general principle that no man can derive a right of action against another from his own violation of duty, or from his own illegal acts. Thus there is no stipulation in this policy that the assured shall not set fire to the buildings insured. If he had done so he could not recover the loss, on the ground not that he had violated any stipulation in the contract, but that he could not profit by the consequences of his own illegal or fraudulent acts. If, however, he had set fire to an adjoining building with the intent to consume the one insured, but no injury to that had in fact ensued, it could not have been contended that the policy was thereby rendered void, notwithstanding the act would have been in the highest degree a violation of the good faith which was pledged to the insurers, that the risk should not be increased by any act of the assured. An erection of buildings on vacant ground by the assured subsequently to the policy and contiguous to those insured, whereby the risk is increased, stands upon the same principle. If buildings thus erected should be removed before the occurrence of any loss, it could not be maintained that the policy would be thereby annulled. The act not being in violation of any express stipulation in the policy, and not resulting in any actual injury to the insurers, the law would regard it as harmless and rightful ; and if this be so, it seems clearly to follow that the continuance of such erections (as in the case now before us) until the fire cannot change the legal consequences of the act of erecting them, if they have in no way been the cause of the loss. The act of the assured in erecting them may have been a breach of an implied understanding between the parties that the situation of the insured premises, with respect to the contiguous buildings, should not be changed by the act of the assured so as to increase the risk ; but if such increase of risk has in fact been without injury to the defendants, the policy is not affected by it." See also *Denkla v. Insurance Co.*, 6 Phila. 233 ; *Miller v. Western, &c. Ins. Co.*, 1 Handy (Cin. Supr. Ct.), 208 ; *Southern Ins. Co. v. Lewis*, 42 Ga. 587.

policy provided in one clause that a "change" without consent should avoid the policy, and in another that the insurers might terminate the contract if additional buildings were erected, it was held that "change" did not include the erection of additional buildings, but referred rather to police regulations against fire.¹ It applies to change in the physical condition of the building, and not to such a change as would be involved in becoming vacant.²

§ 245. **Prohibited Use; Suspension of Policy; Smoking; Tavern-keeping; Bawdy-house.** — Some policies in prohibiting the use of the buildings insured for certain purposes provide that they shall be void only so long as the prohibited use continues. In such cases, of course, although there may have been during the currency of the policy a prohibited use, yet if that use is not in fact made at the time of the fire, but has before that happens been discontinued, there is no forfeiture.³ But under a policy insuring property described as a "back building and stores," and prohibiting certain hazardous uses, the introduction of a prohibited use

¹ *Commercial Ins. Co. v. Mehlman*, 43 Ill. 313. See also *ante*, § 221.

² *Home Ins. Co. v. Kinnier*, 28 Grat. (Va.) 88.

³ *Lounsbury v. Prot. Ins. Co.*, 8 Conn. 459; *N. E. Fire & Mar. Ins. Co. v. Wetmore*, 32 Ill. 221; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9. [If a tug-boat goes out of the limits prescribed in the policy, and after returning to the proper waters a loss occurs, the policy covers the loss. *Hennessey v. Manhattan Fire Ins. Co.*, 28 Hun, 98. It was formerly held in Massachusetts that a temporary illegal use of insured premises, as for a bowling-alley and pool-room, after the expiration of a license for such use, will merely suspend the policy during such unlawful use, and it will revive when such use ceases, unless it was contemplated at the time of insuring to thus unlawfully continue said use, or the temporary use injuriously affects the insurers after it had ceased. *Hinckley v. Germania Ins. Co.*, 140 Mass. 38. But in a subsequent case the court held that an increase of risk by the illegal sale of liquors avoids the policy, although it was only temporary, and ceased before the fire. "The contract of insurance depends essentially upon an adjustment of the premium to the risk assumed. If the assured by his voluntary act increases the risk, and the fact is not known, the result is that he gets an insurance for which he has not paid. In its effect on the company it is not much different from a misrepresentation of the condition of the property." *Kyte v. Commercial Union Ass. Co.*, 149 Mass. 116, 123, reviewing and shifting the ground of *Hinckley v. Germania Ins. Co.*, 140 Mass. 38. A change of use by introducing the shaving of hoops for a few days in a dwelling-house, which was found not to materially increase the risk, and which ceased three days before the fire, was not fatal. *Kircher v. Milwaukee M. M. Ins. Co.*, 74 Wis. 470.]

or business will avoid the policy whether continued to the time of the fire or not.¹ So if in the description itself one use is permitted but another forbidden, as where a building is insured to be occupied as a store, but not as a coffee-house.² So, also, if there be a prohibition against the introduction of any specific article, as, for instance, steam or a steam-engine, the introduction of the prohibited thing, whether permanently or temporarily, — the policy being made void by its terms by such introduction, — and whether for a longer or shorter time, is equally fatal.³ [But it has been held that when the assured in violation of the policy introduced gasoline for lighting, but removed it before the fire, the policy was held good, although the policy was to be, “immediately void” if gasoline, &c. were used.⁴ And it is immaterial that the assured may have been in the *habit* of breaking a condition of a policy (as to keeping benzine, for example), which only operated to make the latter void *so long as* there was a breakage, if at the time of the loss he was complying with the same.⁵] An agreement that smoking shall be prohibited, and a statement that smoking is not allowed upon the insured premises, mean simply that the insured will not himself smoke on the premises, and will prohibit, and take reasonable precautions to prevent, others from smoking there.⁶ So a by-law merely prohibiting insurance of an illegal business, and requiring the agent to remove the danger incurred, works no forfeiture.⁷ If the policy stipulates against an occupation of the premises for purposes considered hazardous at any time when a fire shall happen, but does not define the meaning of the word, nor

¹ Mead v. N. W. Ins. Co., 3 Seld. (N. Y.) 530.

² Lawless v. Tenn. Mar. & Fire Ins. Co., Circuit Ct. St. Louis, Mo. 1852 (cited by Angell, Ins. § 169, n.); s. c. Hunt's Merch. Mag., Feb. 1853; 3 Bennett Fire Ins. Cas. 499.

³ Glen v. Lewis, 8 Wels., Hurl. & Gor. (Exch.) 607.

⁴ [Mutual Fire Ins. Co. v. Coatesville Shoe Factory, 80 Pa. St. 407, 412.]

⁵ [Maryland, &c. Ins. Co. v. Whiteford, 31 Md. 219, 228.]

⁶ Insurance Co. of North America v. McDowell, 50 Ill. 120; Aurora Fire Ins. Co. v. Eddy, 55 id. 213.

⁷ Behler v. German, &c. Ins. Co. (Ind.), 9 Ins. L. J. 778. See also *ante*, § 231; Com. Ins. Co. v. Mehlman, 48 Ill. 313.

contain any class of risks denominated hazardous, nor add the test of increase of risk, it will of course be for the jury to determine not only whether there has been a change of use, but whether that change is considered hazardous; and this would depend upon the degree of the increase of the risk.¹ Keeping a bar-room in a boarding-house is not "tavern-keeping";² nor is the keeping a bawdy-house in a house insured and described as a "dwelling-house" a concealment, though the house was set on fire and destroyed by a mob, such a result not being the natural consequence of such a use.³ [But if the description is of a dwelling-house, and the policy is to be void by change of use, keeping a bawdy-house on the premises is fatal.⁴ (a) If a policy requires notice of a change of occupancy, a use of ordinary sleeping apartments for purposes of assignation and prostitution, without notice, is fatal.⁵ The description of premises as a "saw-mill" does not restrict its use to such purpose.⁶

§ 246. **Unlawful Use; Illegal Keeping.** — That unlawful use of the premises insured which will avoid a policy stipulating against it, is not a mere casual use, or permission of use, for an unlawful purpose, or the doing of a particular unlaw-

¹ Robinson v. Mercer County Mut. Fire Ins. Co., 3 Dutch. (N. J.) 134.

² Rafferty v. N. B. Fire Ins. Co., 3 Harr. (N. J.) 480.

³ Lochner v. Home Mut. Ins. Co., 17 Mo. 247; s. c. 19 id. 628.

⁴ [Cedar Rapids Ins. Co. v. Shimp, 16 Brad. 248, 256.]

⁵ [Ind. Ins. Co. v. Brehm, 88 Ind. 578.]

⁶ [Frost's Detroit Lumber, &c. Works v. Millers', &c. Mut. Ins. Co., 37 Minn. 300.]

(a) See National F. Ins. Co. v. U. S. Building & Loan Ass'n's Assignee (Ky.), 54 S. W. 714; Phenix Ins. Co. v. Clay (101 Ga.), 65 Am. St. Rep. 307, and note. Insurance of a house used for prostitution is not invalid, if the policy contains no stipulation against such use. Phenix Ins. Co. v. Clay, 101 Ga. 331. But if a house, being insured as a dwelling-house and inn, is kept as a house of prostitution and lewdness, it renders the fire risk more hazardous and forfeits the conditions of the policy as

to increased risk. Bonenfant v. American F. Ins. Co., 76 Mich. 653. Where the insured house was described as "occupied as a sporting house," it was held that as the term "sporting house" has an innocent as well as guilty meaning, it could not be said, without proof of the sense in which it was used, that the policy showed conclusively that the occupancy of the house was for unlawful purposes. White v. Weston Ass. Co., 52 Minn. 352.

ful act therein, as the commission of a misdemeanor or even a felony, — it must be in some substantial sense a use for the alleged unlawful purpose.¹ But where there is a constant, exclusive, and habitual use of the insured premises for unlawful purposes, or in contravention of a legal restriction, as where the tenant of the insured for three months prior to the fire unlawfully stored and kept intoxicating liquors for sale, and nothing else, this was held to be an insurance for the protection of the illegal acts, and to violate a proviso that the policy should be void if the building insured should be “occupied or used for unlawful purposes,” although the owner and insured had no knowledge in fact of such unlawful use.² So where a hotel is kept without a license,³ or a billiard saloon.⁴ On the other hand, it has been held in Michigan⁵ that, as under a prohibition against keeping gunpowder or other articles “subject to legal restriction” in “greater quantities or in a different manner than prescribed by law,” only such articles are included as are of an intrinsically dangerous nature, the illegal keeping of liquors for sale will not avoid the policy, and illegally kept liquors may be insured. The court in that case say: “It is claimed that if these liquors can be allowed to be included in the policy, the policy will be to all intents and purposes insuring an illegal traffic; and several cases were cited involving marine policies on unlawful voyages, and lottery insurances, which have been held void on that ground. These cases are not at all parallel, because they rest upon the fact that, in each instance, it is made a necessary condition of the policy that the illegal act shall be done. The ship being insured for a certain voyage, that voyage is the only one upon which the insurance would apply, and the underwriters thus become directly parties to

¹ Boardman v. Merrimack, &c. Ins. Co., 8 Cush. (Mass.) 583.

² Kelly v. Worcester Mut. Fire Ins. Co., 97 Mass. 284; Jones v. Fireman's &c. Ins. Co., 2 Daly (N. Y.), 307; Johnson v. Union, &c. Ins. Co., 127 Mass. 555; Lawrence v. National Fire Ins. Co., 127 Mass. 557.

³ Campbell v. Charter Oak Ins. Co., 10 Allen (Mass.), 213.

⁴ Johnson v. Union, &c. Ins. Co., 127 Mass. 555.

⁵ Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124.

an illegal act. So insuring a lottery-ticket requires the lottery to be drawn in order to attach the insurance to the risk. If this policy were in express terms a policy insuring the party selling liquors against loss by fire or forfeiture, it would be quite analogous. But this insurance is only upon property, and the risks insured against are not the consequences of illegal acts, but of accident. Our statute does not in any way destroy or affect the right of property in spirituous liquors, or prevent title being transmitted, but renders sales unprofitable by preventing the vendor from availing himself of the ordinary advantages of a sale, and also affixes certain penalties.¹ By insuring this property, the insurance company have no concern with the use the insured may make of it, and, as it is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner, unless the contract itself is for a directly illegal purpose. Collateral contracts, in which no illegal design enters, are not affected by an illegal transaction with which they may be remotely connected.”² The engagement in an illegal voyage of the person whose life is insured by another, that other not having knowledge of the fact, and there being no prohibition in the policy, is immaterial.³

[§ 246 A. **Knowledge of Agent or Officer;**⁴ **Parol Evidence.** — If the president of the company who has exercised the power of making and renewing contracts, knows that the insured is adding to his buildings under a verbal assent, the company cannot avail itself of the increase of risk.⁵ Where buildings had been used and insured for exhibition buildings, evidence of former insurance of this kind is admissible to prove that the company knew for what purposes the buildings were to be used.⁶ When the “Crystal Palace” in New

¹ Hibbard v. People, 4 Mich. 125; Bagg v. Jerome, 7 id. 145.

² The court cites, in support of their last proposition, Ocean Ins. Co. v. Polleys, 13 Pet. (U. S.) 157; Armstrong v. Toler, 11 Wheat. (U. S.) 258, which were respectively cases of evasion of registry and revenue laws. See also § 327.

³ Lord v. Dall, 12 Mass. 115.

⁴ [See also § 249 I, and ch. 7, anal. 5.]

⁵ [Martin v. Jersey City Ins. Co., 44 N. J. 273.]

⁶ [Mayor of New York v. Exchange Fire Ins. Co., 9 Bos. 424, 434.]

York was insured, it being well known to be an exhibition building, the company were held to have known that fire and steam heat, a restaurant, ovens, &c., were a necessary part of the business to be carried on therein, and to have intended to include all such uses and risks.¹ If before loss the agent of the company knows of an increase of risk and the company does not cancel the policy the objection is waived.² It is competent to show, at law, by parol evidence that the company agreed to permit the use of kerosene, but by mere forgetfulness omitted to indorse the permission on the policy.³ The knowledge of an increase of risk by one who acts as agent for the mortgagor and mortgagee in securing a renewal of insurance, binds the mortgagee, and if such increase is not disclosed the new policy is void.⁴

§ 247. **Occupancy; Use.** — If in the application the property on which insurance is sought is denominated a “dwelling-house,” without any stipulation touching its use or occupation, this is mere description, and amounts neither to a representation that it is occupied, nor a warranty that it shall be.⁵ (a) If the property be denominated as the house

¹ [Mayor of New York v. Hamilton Ins. Co., 10 Bos. 537, 552.]

² [North British, &c. Ins. Co. v. Steiger, 124 Ill. 81.]

³ [Insurance Co. v. Melvin, 1 Walker (Pa.), 364.]

⁴ [Cole v. Germania Fire Ins. Co., 99 N. Y. 36.]

⁵ [Woodruff v. Imperial Ins. Co. (N. Y.), 10 Ins. L. J. 125; Cumberland Valley, &c. Ins. Co. v. Douglass, 58 Pa. St. 419; Rowe v. Liverpool, &c. Ins. Co., 12 Gr. Ch. (U. C.) 311; Browning v. Home Ins. Co., 71 N. Y. 508. But see Alexander v. Germania Fire Ins. Co., 66 id. 464. It has been held in New York that the description of property as a “dwelling-house” is a warranty that the building is, and is to be, used only as a dwelling-house. Sarsfield v. Metropolitan Ins. Co., 61 Barb. (N. Y.) 479, following Wall v. East River Ins. Co., 7 N. Y. 370.

(a) In a fire policy covering a building “occupied by assured as a dwelling-house,” and providing that “if the risk shall be increased from any cause whatever, within the knowledge of the assured, . . . the company shall not be liable therefor,” the phrase “occupied by assured as a dwelling-house,” is not a warranty, but a mere matter of description, and a lease of part of the building does not avoid the policy. *Heffron v. Kittanning Ins. Co.*, 132 Penn. St. 580.

See *Moody v. Amazon Ins. Co.* (Ohio), 38 N. E. 1011; *Phenix Ins. Co. v. Martin* (Miss.), 16 So. 417. Under a policy insuring property as a building while occupied by assured as a store and dwelling-house, and providing that it should be void in case the premises became vacant or unoccupied, cessation of occupancy as a dwelling, with continued occupancy as a store, is not a violation. *Burlington Ins. Co. v. Brockway*, 138 Ill. 644. Where the

occupied by a particular person, this is at most a warranty that it is, and not that it shall continue to be, so occupied.¹ And in neither case does the fact that the house is for a time unoccupied — whether at the time of the insurance² or afterwards,³ — or is used as a boarding-house,⁴ vitiate the policy, even though the loss happen while the dwelling-house is vacant or so used. (a) And this is so, although the appli-

¹ Liverpool, &c. Ins. Co. v. McGuire, 52 Miss. 227.

² Diehl v. Adams County Mut. Ins. Co., 58 Pa. St. 443. *Contra*, if the policy is to be void if the premises are described otherwise than as they really are, and they are occupied for more hazardous uses than that for which they are insured. Martin v. Franklin Fire Ins. Co., 42 N. J. 46. See also Parmelee v. Hoffman Ins. Co., 54 N. Y. 193. So if the policy state that buildings unoccupied are not insured. Ashworth v. Builders', &c. Ins. Co., 112 Mass. 422. See also *post*, § 248.

³ O'Niel v. Buffalo Fire Ins. Co., 3 Comst. (N. Y.) 122; Cumberland Valley, &c. Ins. Co. v. Douglass, 58 Pa. St. 419.

⁴ Planters' Ins. Co. v. Sorrels, 1 Baxter (Tenn.), 352.

policy was on the "one-story frame building and additions thereto with shingle roof, occupied by assured as a dwelling, . . . including . . . gas and water pipes and fixtures for heating and lighting as a part of the building," and in the rear of the main building were successively a laundry, a woodshed, and a part used as a carriage-house and stalls, all under the same shingle roof and communicating by doors, and above the carriage-house was the bedroom of the hired man, who was also a house servant, which was furnished like the rest of the house, and had gas and speaking-tubes connected with the rest of the building, the policy was held to cover the carriage-house. Hanan v. Williamsburgh City F. Ins. Co., 81 Mich. 556. The building, viz., "her frame stable and carriage-house buildings, belonging with said dwelling and on the same lot," was held to be within the description of the policy, if it was in part used by the plaintiff as a carriage-house, belonging with her dwelling-house, and on the same lot, although it was also used to some extent by persons other than the plaintiff for other purposes. Robinson v. Pennsylvania F. Ins. Co., 87 Maine, 399.

(a) A hotel is not a dwelling-house, and cannot be insured as such. Thomas v. Commercial Union Ass. Co., 162 Mass. 29; see State Ins. Co. v. Taylor, 14 Col. 499. But a boarding-house may properly be described as a dwelling; and, if it is not occupied, but is merely under the care of a person living in the same inclosure, it is vacant within the meaning of the policy. Burner v. German-Am. Ins. Co. (Ky.), 45 S. W. 109. When a dwelling is insured with the furniture therein, a day oversight of both by the insured's hired man is not equivalent to customary occupancy. Hanscom v. Home Ins. Co., 90 Maine, 333; Agricultural Ins. Co. v. Hamilton, 82 Md. 88; Home Ins. Co. v. Wood, 47 Kansas, 521; see Moody v. Ins. Co., 52 Ohio St. 12. Where it was claimed that the building insured as a dwelling was used as a Keeley Institute, which called for a different rate of premium, it was held that the rule making parol evidence inadmissible to vary a written contract did not prevent the insured from showing, by way of estoppel, a knowledge of its real use by the general agent through whom it was insured; and that, the application having been prepared by such agent, the company

cation and conditions are made part of the policy, and one of the conditions provides that the insurance shall be void and of no effect if the risk shall be increased by any means whatever within the control of the insured.¹ So, if stated to be used and occupied for farmer's use.² So if a building is stated to be fastened up, and only occupied for a certain purpose, though the statement be made a warranty by the terms of the policy, it is only a warranty of the situation at the time of effecting the insurance, and not that it shall so continue during the whole term of the risk.³ (a) It would be

¹ *Joyce v. Maine Ins. Co.*, 45 Me. 168; *Gilliat v. Pawtucket Mut. Fire Ins. Co.*, 8 Rich. 282.

² *Gamwell v. Merchants' & Farmers' Mut. Fire Ins. Co.*, 12 Cush. (Mass.) 167.

³ [The insurance of a house as occupied, without more, is not a promise that it shall remain so. *Somerset County Mut. Fire Ins. Co. v. Usaw*, 112 Pa. St. 80.]

was estopped to rely on a misdescription. *Glover v. National F. Ins. Co.*, 85 Fed. Rep. 125.

As to builder's and other permits for temporary non-occupancy, see *Hill v. Commercial Union Ass. Co.*, 164 Mass. 406; *Burnham v. Royal Ins. Co.*, 75 Mo. App. 394; *Dupuy v. Delaware Ins. Co.*, 63 Fed. Rep. 680; *German Ins. Co. v. Penrod*, 35 Neb. 273; *Newmarket Sav. Bank v. Royal Ins. Co.*, 150 Mass. 374; *Des Moines Ice Co. v. Niagara F. Ins. Co.*, 99 Iowa, 193; *Ranspach v. Teutonia F. Ins. Co.*, 109 Mich. 699; *England v. Westchester F. Ins. Co.*, 81 Wis. 583; *Thomson v. Southern Mut. Ins. Co.*, 90 Ga. 78; *Robinson v. Aetna Ins. Co. (Ky.)*, 38 S. W. 693; *Thomas v. Hartford F. Ins. Co. (Ky.)*, 53 id. 297.

As to facts showing a waiver of the permit required by the policy in case of vacancy, see *Trott v. Woolwich F. Ins. Co.*, 83 Maine, 362; *Quinsigamond Lake S. Co. v. Phenix Ins. Co.*, 172 Mass. 367; *Strunk v. Firemen's Ins. Co.*, 160 Penn. St. 345.

(a) Vacancy of the premises without the insurer's consent, before the policy really becomes effective, does not avoid the policy. *Wainer v. Milford Mut. F.*

Ins. Co., 153 Mass. 336. So if the insured building is unoccupied when the policy is issued, and this is known to the insurer's agent who issues it, the policy is valid. *Hilton v. Phenix Ass. Co.*, 92 Maine, 272; *Rochester Loan Co. v. Liberty Ins. Co.*, 44 Neb. 537. Such agent may by parol waive a provision of the policy requiring the building to be completed and occupied within thirty days. *Queen Ins. Co. v. Kline (Ky.)*, 32 S. W. 214. See *Hotchkiss v. Phenix Ins. Co.*, 76 Wis. 269; *O'Brien v. Prescott Ins. Co.*, 134 N. Y. 28; *Messelbaek v. Norman*, 122 N. Y. 578; *Cross v. National F. Ins. Co.*, 132 N. Y. 133. In proving a loss, even misrepresentations as to occupancy, when clearly unintentional, do not avoid the policy. *Hilton v. Phenix Ins. Co.*, *supra*. See *McNally v. Phenix Ins. Co.*, 137 N. Y. 389. If the insured insists upon a permit for vacancy, when he pays a premium note, and afterwards asks to have the money returned on receiving no reply, and repayment is not made, the insurer waives the condition as to occupancy. *Havens v. Home Ins. Co.*, 111 Ind. 90; *Phenix Ins. Co. v. Boyer*, 1 Ind. App. 329. A clause in the policy that it shall be inoperative during tem-

unreasonable, if not absurd, to suppose that the owner of a building which may be usefully and profitably occupied could intend by such a stipulation to deprive himself of such use and profit during the entire term covered by the policy, unless so explicitly stated. That such is not the intention of the insurers is to be inferred, especially if they provide elsewhere in the policy against an increase of risk.¹ Nor is it material that there is a change in tenants² from a careful to a negligent one,³ or from a reputable to a disreputable one.⁴ (a) In *Catlin v. The Springfield Fire Insurance Company*,⁵ the property was described as "at present occupied by one Joel Rodgers as a dwelling-house, but to be occupied hereafter as a tavern, and is privileged as such," and the latter clause was held not to be either a warranty that the house should be occupied as a tavern, or even a representa-

¹ *Blood v. Howard Fire Ins. Co.*, 12 Cush. (Mass.) 472; *U. S. Fire & Mar. Ins. Co. v. Kimberly*, 34 Md. 224.

² *Hobson v. Wellington Dist. Ins. Co.*, 6 U. C. (Q. B.) 536.

³ *Gates v. Madison County Mut. Ins. Co.*, 1 Seld. (N. Y.) 469.

⁴ *Lyon v. Com. Ins. Co.*, 2 Rob. (La.) 266.

⁵ 1 Sumner (U. S. C. C.), 435.

porary vacancy is effective during the periods of non-occupancy. *Baldwin v. German Ins. Co.*, 105 Iowa, 379. The assignee of a policy is bound by a stipulation therein against vacancy. *Ranspach v. Teutonia F. Ins. Co.*, 109 Mich. 699.

In *Worley v. State Ins. Co.*, 91 Iowa, 150, the premium paid was a gross sum, and the policy insuring in specific sums a house and barn, its provision against the vacancy of both was held not violated by the vacancy of one. In *Conn. F. Ins. Co. v. Tilley*, 88 Va. 1024, where eight double houses, with lanes running between them, were insured as sixteen different houses, the separate valuation put upon them by the parties caused them to be treated as distinct matters of contract with respect to the stipulation against vacancy of the "insured premises." In *Speagle v. Dwelling-House Ins. Co.*, 97 Ky. 646, the vacancy of two of several insured houses was

held not to affect the others, each being insured for a specific amount. In *Burlington Ins. Co. v. Brockway*, 138 Ill. 644, a building represented as occupied as a store-house and dwelling-house, with a provision against vacancy, was held not avoided by its occupancy only as a store-house, as the warranty related only to use when insured, and express words are necessary for a continuing warranty.

Occupancy for the fraudulent purpose of burning the building or its contents is not such occupancy as is intended by the policy. *Names v. Dwelling-House Ins. Co.*, 95 Iowa, 642. Vacancy in violation of an insurance policy is matter of defence. *Butternut Manuf. Co. v. Manufacturers' M. F. Ins. Co.*, 78 Wis. 202.

(a) See *Bonenfant v. American F. Ins. Co.*, 76 Mich. 653, 660; *supra*, § 245, n. (a).

tion of the intention to occupy it as such. The insured was the mortgagee, and if the language could fairly be treated as his, it would import no more than a representation. But the language cannot in strictness be treated as the language of the mortgagee. He cannot be presumed, in the absence of evidence, to intend to take possession and control of the property. It is to be privileged by the company of course, to be used as a tavern. This is their language, and imports a license or privilege granted by the insurers to use the house as a tavern if the insured so desire, but by no means an undertaking on his part that it shall be so used. And in *Boardman v. N. H. Mutual Fire Insurance Company*¹ it was held that such descriptive words in an application were not warranties, but mere representations, although expressly made part of the contract by reference; on the ground that it could not reasonably be supposed that the insurers could intend to make the validity of the policy dependent upon so trifling a matter as a mere change of tenants, or a change from occupancy to vacancy, unless they said so expressly. Nor is a statement that the insured buildings are "occupied as stores" a warranty that they shall all be occupied.² But such a statement is doubtless a warranty of the then existing use or occupation.³ A change from occupation to disuse is a change in the "use or occupation" of the property within the meaning of chapter 34 of the Laws of Maine, 1861.⁴ (a)

¹ 20 N. H. 551. See also *Billings v. Tolland County Mut. Fire Ins. Co.*, 20 Conn. 139.

² *Carter v. Humboldt Fire Ins. Co.*, 17 Iowa, 456.

³ *Farmers' & Drovers' Ins. Co. v. Curry*, 13 Bush (Ky.), 312.

⁴ *Cannell v. Phoenix Ins. Co.*, 59 Me. 582. That statute is as follows: "No insurance company shall avoid payment of a loss by reason of incorrect statements of value or title, or erroneous description by the insured in the contract of insurance, if the jury shall find that the difference between the property described and as really existing did not contribute to the loss, or materially increase the risk; any change in the property insured, its use or occupation, or breach of any of the conditions or terms of the contract by the insured, shall not affect the contract unless the risk was thereby materially increased." Laws of 1861, c. 34.

(a) Now, under the Maine Rev. Stats., ch. 49, § 20, which places the burden of proof on the insurance company to show, in case of loss, that non-occupancy materially increased the risk, such burden, in a case devoid of any proof of the attendant circumstances, may be sufficiently sustained in the first

But such a change is not "a change in the nature of the occupancy," which means occupation for a different purpose.¹

§ 248. **Occupancy; Vacation.**—A statement in the application that the unoccupied building insured is to be occupied by a tenant, is not a warranty that it shall be so occupied, but rather the representation of the insured's expectation that it will be so occupied, and not by himself, and a reservation of the right to have it so occupied, to avoid the inference that it is to remain unoccupied. Nor does it exclude the insured from the right to occupy. This is inferable from the obvious difficulty of fixing any time when it could be alleged there was a breach of the warranty, if it were a warranty.²(a) Perhaps if the time were fixed

¹ *Gould v. Brit. Am. Ass. Co.*, 27 U. C. (Q. B.) 473.

² *Hough v. City Fire Ins. Co.*, 29 Conn. 101; *Catlin v. Springfield Fire Ins. Co.*, 1 Sumner (U. S.), 434; *Herrick v. Union Mut. Fire Ins. Co.*, 48 Me. 558; *Kelley v. Home Ins. Co.*, C. Ct. (Kans.), 5 Ins. L. J. 134.

instance by the natural presumption to that effect based upon the observation and experience of intelligent men generally. *White v. Phoenix Ins. Co.*, 83 Maine, 279; 85 id. 97; *Jones v. Granite State F. Ins. Co.*, 90 id. 40.

(a) What is meant by the clause "vacant and unoccupied," in a policy of insurance, is a question of law; but whether the building was at the time of the loss vacant and unoccupied, within the meaning of the policy, is a question of fact. Thus, where a tenant had left the house without notice, and a new one, who was waiting to occupy it, had begun to move in, it was held to be a question of fact whether the premises were vacant and unoccupied. *Home Ins. Co. v. Mendenhall*, 164 Ill. 458, 469; see *Richards v. Continental Ins. Co.*, 83 Mich. 508; *Robinson v. Aetna Ins. Co. (Ky.)*, 38 S. E. 693; *Dwelling-House Ins. Co. v. Osborn*, 1 Kans. App. 197; *Moody v. Ins. Co.*, 52 Ohio St. 12; *Roe v. Dwelling-House Ins. Co.*, 149 Penn. St. 94; *Limburg v. German F. Ins. Co.*, 90 Iowa, 709; 48 Am. St. Rep. 468, 478, note; *Moore v. Phoenix Ins.*

Co. (N. H.), 10 id. 384, 390, note; *Worley v. State Ins. Co.*, 91 Iowa, 150; *Clifton Coal Co. v. Scottish Union & N. Ins. Co.*, 102 Iowa, 300; *German-American Ins. Co. v. Buckstaff*, 38 Neb. 135; *Liverpool, &c., Ins. Co. v. Buckstaff*, id. 146; *Moriarty v. Home Ins. Co.*, 53 Minn. 549; *Burlington Ins. Co. v. Lowery*, 61 Ark. 108; *East Texas F. Ins. Co. v. Kempner (Tex. Civ. App.)*, 25 S. W. 999; *Eureka F. & M. Ins. Co. v. Baldwin (Ohio)*, 57 N. E. 571. In such cases, the insurer, though knowing of the vacancy, owes no duty to the insured to prevent a forfeiture by notifying him thereof. *Home Ins. Co. v. Scales*, 71 Miss. 975. Substantial compliance with the contract is all that is required, and a mere temporary absence, which does not increase the risk, is not fatal. *Springfield F. & M. Ins. Co. v. McLimans*, 28 Neb. 846; *Johnson v. Norwalk F. Ins. Co. (175 Mass.)*, 29 Ins. L. J. 371. In all these cases, the mere letter of the contract may be disregarded in aid of its real purpose. Thus, where a canning establishment was, at the close of the season,

within which it should be occupied, or within which notice of vacation should be given,¹ the rule would be different.² If in the description the recital is that the property insured is only to be used or occupied in a certain way, or not to be used or occupied at all, this is an agreement, and must be complied with;³ and so it is if the policy provides that unoccupied buildings must be insured as such, and in case the building becomes vacant the insured shall give notice, or forfeit his right to recover.⁴ Not unfrequently it is provided that if the occupant personally vacates the premises insured, or the building becomes vacant, the policy will be void, unless immediate notice⁵ be given to the insurers and

¹ *Alston v. Old North State Ins. Co.*, 80 N. C. 326.

² *Bilbrough v. Metropolitan Ins. Co.*, 5 Duer (N. Y.), 587; *Devine v. Home Ins. Co.*, 32 Wis. 471; *Cardinal v. Dominion Ins. Co.*, 16 Can. L. J. (Q. B.) 335.

³ *Stout v. City Fire Ins. Co.*, 12 Iowa, 371.

⁴ *Wustum v. City Fire Ins. Co.*, 15 Wis. 138; *Harrison v. City Fire Ins. Co.*, 9 Allen (Mass.), 231; *Alston v. Old North State Ins. Co.*, 80 N. C. 326; *ante*, § 247.

⁵ [And the notice given must be truthful in its material details. A policy contained the usual "vacant or unoccupied" clause with the addition "unless

insured as a place of storage, and the policy provided that it should be used for storage only, the building of a fire under the boiler to blow the water out of the pipes and flues, was held not to be a use of the premises for a purpose other than storage. *Krug v. German F. Ins. Co.*, 147 Penn. St. 272. So a provision that a factory must be operated is not violated, upon the owner's insolvency, by his assignee renewing the policy when the premises had ceased to be used for manufacturing, the fires being out, but were occupied by the foreman for putting together and selling the machines already made. *Bole v. New Hampshire F. Ins. Co.*, 159 Penn. St. 53. In *German Ins. Co. v. Davis*, 40 Neb. 700, where tenants stipulated for in the policy, moved out in the evening a few hours before the fire, and the owner, living in another city, could not be notified so as to attend to the matter, the policy was held not

avoided because of vacancy; and *Norval, C. J.*, said, in reference to the conflicting authorities: "The meaning of the words 'vacant and unoccupied,' when used in a policy upon a dwelling, is not the same as when used in a contract of insurance on a store building, livery stable, or a school-house. It will hardly be contended that a policy on a school building is not in force during the summer vacation of the school, although there is no person in the building during that period. The use to which the building is adapted and devoted has much to do in determining whether it is vacant or unoccupied. Each case must be determined upon its own peculiar facts."

In courts of equity, where forfeitures are not favored, the want of occupancy, to be fatal to the insured, must be shown to have been a contributing cause to the fire or to its continuance. *Traders' Ins. Co. v. Race*, 142 Ill. 338.

an additional premium paid. In such case, vacation without notice and payment of the additional premium is of course fatal to the right of the insured to recover for a loss, and notice to a special agent, among other things, authorized to receive cash for premiums, is not sufficient, if the premium be not also paid. It is indeed doubtful if the payment of the premium would help the matter, as it is questionable whether an agent to receive premiums fixed by the company would have the right to fix the rate of additional premium.¹ A mere absence of the family on a visit, however, with no intention to remove and vacate the house, is not a violation of a condition that it shall not be left vacant and unoccupied;² (a) nor is the leaving a furnished summer-house in the fall, with intent to return in the spring, the house being meanwhile in the charge of a person who lived near by.³ And it seems that the use and occupation of a school-house in the usual manner, with stated vacations, would be permissible; but not the removal of the school

notice of removal, with all particulars, be given the company." The assured gave notice that he was to go on a three or four weeks' visit, but would leave nearly all the household goods. On the contrary, practically all of them were taken away, and it was held that the policy was avoided. A house containing goods is more apt to be taken care of, and the company has a right to avail itself of this security, so that the misstatement was material. *Hill v. Equitable Mut. Fire Ins. Co.*, 58 N. H. 82, 83.]

¹ *Harrison v. City Fire Ins. Co.*, 9 Allen (Mass.), 231; *Wustum v. City Fire Ins. Co.*, 15 Wis. 138; *Dennison v. Phoenix Ins. Co.* (Iowa), 9 Ins. L. J. 65; *Hill v. Equitable Ins. Co.* (N. H.), 6 Ins. L. J. 314; *Paine v. Agricultural Ins. Co.*, 5 S. C. (N. Y.) 619; *American Ins. Co. v. Padelfield*, 78 Ill. 167; *Cook v. Continental Ins. Co.*, 70 Mo. 610; *McClure v. Watertown Ins. Co.* (Pa.), 9 Ins. L. J. 209.

² *Stupetzki v. Transatlantic Fire Ins. Co.*, 43 Mich. 373. [Where a house was left for a brief visit, the family leaving at home all but the few garments needed while away, and the husband returned and stayed in the house overnight, occasionally, and he and another were in it during the night of the fire, the house was not "vacant and unoccupied." Occupancy only requires the presence of human beings as at their customary abode; not uninterruptedly but as the place of usual return and habitual stoppage. *Johnson v. N. Y. Bowery Fire Ins. Co.*, 39 Hun, 410. In this case the house was occupied in fact at the time of the fire. *Stupetzki v. Transatlantic Fire Ins. Co.*, 43 Mich. 373, 374.]

³ *Herrman v. Merchants' Ins. Co.* (N. Y.), 9 Ins. L. J. 658.

(a) *Hill v. Ohio Ins. Co.*, 99 Mich. 466; *McMurray v. Capital Ins. Co.*, 87 Iowa, 453.

furniture, and the suspension of the school.¹ Nor does a mill become unoccupied by a mere temporary suspension of its full operation, and while it is used for the storage and delivery of goods, requiring daily visits from one or two persons;² [nor by a stoppage for repairs, enough employees being on hand to retain possession and keep watch.³ Interruptions and the necessary disuse temporarily of a saw-mill, by reason of low water, derangement of machinery, &c., do not break the forfeited-if-vacant-clause in a policy.⁴] But a warranty that a family shall live in the house throughout the year is not kept by merely having two workmen occupy it as a lodging-place taking their meals elsewhere.⁵

If there is no express stipulation that the premises shall not be left vacant, the policy will not be void, although the risk be increased by the fact that they are so left, unless perhaps when they are purposely so left.⁶ So, although there be an express oral promise, if the promise be in good faith.⁷ And under an agreement that a vessel shall be provided with "master, officers, and crew," the giving up the vessel to workmen for repairs is no violation of the contract.⁸ So a temporary vacancy with intention to return is not a "removal," it not being abandoned as a place of abode.⁹ (a) There is no implied obligation to keep a watch

¹ *American Ins. Co. v. Foster* (Ill.), 9 Ins. L. J. 268.

² *Albion Lead Works v. Williamsburg, &c. Ins. Co.*, C. Ct. (Mass.), 2 Fed. Rep. 479.

³ [*Brighton Manuf. Co. v. Reading Fire Ins. Co.*, 33 Fed. Rep. 232. See also 234. *American Fire Ins. Co. v. Brighton Cotton Manuf. Co.*, 24 Brad. 152; *American Fire Ins. Co. v. Brighton Cotton Manuf. Co.*, 125 Ill. 131.]

⁴ [*Whitney v. Black River Ins. Co.*, 72 N. Y. 117, 120.]

⁵ *Poor v. Humboldt*, 125 Mass. 274. See also *Cook v. Continental Ins. Co.*, 70 Mo. 610.

⁶ *Gamwell v. Merchants' & Farmers' Mut. Fire Ins. Co.*, 12 Cush. (Mass.) 167; *Foy v. Aetna Ins. Co.*, 3 Allen (N. B.), 29.

⁷ *Kimball v. Aetna Ins. Co.*, 9 Allen (Mass.), 540; *Stout v. City Fire Ins. Co. of New Haven*, 12 Iowa, 371.

⁸ *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713.

⁹ *Cummins v. Agr. Ins. Co.*, 67 N. Y. 260; *Phoenix Ins. Co. v. Zucker* (Ill.), 9 Ins. L. J. 193. But see *Sleeper v. New Hampshire Fire Ins. Co.*, 56 N. H. 401.

(a) The terms "absence" and "removal" differ widely when applied to a dwelling-house, and a clause providing against vacancy "by removal" for more than thirty days is not violated, as matter of law, by an absence for health,

in or about a vacant house.¹ But when by express terms, if the risk is increased in any manner by the permission of the insured during the currency of the policy, it is to become void, the voluntarily leaving a house, occupied when insured, unoccupied for such a length of time and under such circumstances as to warrant an inference that it was purposely so left unoccupied, will have the effect to avoid it.²

§ 249. **Change of Possession; Occupancy; Vacation.** — Under a provision that the policy shall cease to protect the property from the time when it shall be “levied on or taken into possession or custody under an execution, or any proceeding in law or in equity,” an unlawful levy, made upon the property as that of a person other than the insured, will not have the effect to invalidate the policy.³ And although the mere notice of the levy, by the officer charged with the duty, to the defendants, — the insured, — without taking the property into possession or custody, may be good as a levy, it will not be sufficient to defeat the policy. It is an actual, not a constructive, change of possession that is contemplated.⁴ [Chattel mortgages on growing crops do not increase the risk until the crops are harvested.⁵] And the ordinary going out of one tenant is not a change of tenancy till the advent of a new tenant; nor does the vacancy during the intervening time constitute a change of occupancy. Thus, under a provision that “if any change be made as to the tenants or occupancy of the premises,” without notice, the policy shall be void, the fact that the premises were unoccupied at the time of the fire, the tenant having vacated

¹ *Soye v. Merchants' Ins. Co.*, 6 La. An. 761.

² *Luce v. Dorchester Ins. Co.*, 105 Mass. 297.

³ *Phila. Fire & Life Ins. Co. v. Mills*, 44 Pa. St. 241.

⁴ *Com. Ins. Co. v. Berger*, 42 Pa. St. 285. And see *post*, § 274.

⁵ [*Tiefenthal v. Citizens' Mut. Fire Ins. Co.*, 53 Mich. 306.]

intended to continue for three months, when there is no change in the interior furnishings; but the question is one of fact for the jury. *Stone v. Granite State F. Ins. Co.* (N. H.), 45 Atl. 235.

“vacant by the removal of the occupant,” see *Stone v. Granite State F. Ins. Co.* (N. H.), 45 Atl. 235; *Johnson v. Norwalk F. Ins. Co.* (Mass.), 56 N. E. 569.

As to the meaning of the clause

the premises but a few days previous, and no new tenant having taken possession, no notice at all is necessary until the change takes place; that is, until a new tenant is in possession. A mere surrender of one tenant without the entry of another is not such a change as is contemplated by the words of the proviso.¹ Nor is the leaving a building unoccupied after it has been vacated by a tenant an alteration of the use to which the premises are applied.² On the other hand, it is not sufficient to constitute occupancy, within the meaning of a stipulation that the property insured — a trip-hammer shop — shall not remain unoccupied over thirty days, that the tools remain in the shop, and an employee of the insured goes almost every day through the shop to look around and see if everything is right, but no practical use is made of the building.³

[§ 249 A. **Scope of the Terms "Vacant" and "Unoccupied."** — Vacant and unoccupied are not synonymous, and both facts must concur to render a policy void. Vacant means empty of everything but air; wherefore a house full of furniture, clothing, &c., left in charge of servants, is not vacant. Unoccupied means that no one has the actual use or possession.⁴ The words must be construed with reference to the kind of structure or building insured. As to a saw-mill, total abandonment seems to be necessary.⁵ Occupancy means actual use as a dwelling-house, and leaving some one to look after the house is not a sufficient substitute for the care and supervision involved in occu-

¹ *McAnnally v. Somerset County Mut. Ins. Co.*, 2 Pittsburgh Rep. (Crumrine) 189; *Alston v. Old North State Ins. Co.*, 80 N. C. 326; 8 Ins. L. J. 428. [A stipulation against change of tenants or use of premises does not render the policy void by reason of a change to no tenant and no use. *Somerset County Mut. Fire Ins. Co. v. Usaw*, 112 Pa. St. 80.] But under such facts, a provision in the policy that its protection shall be suspended while the house should be unoccupied, was held to apply to a vacancy of six days between the outgoing and incoming tenants, the latter having waited for repairs. *Etna Ins. Co. v. Meyers*, 63 Ind. 238; s. c. and note, 8 Ins. L. J. 249; *ante*, § 191.

² *Hawkes v. Dodge County Mut. Ins. Co.*, 11 Wis. 188.

³ *Keith v. Quincy Mut. Fire Ins. Co.*, 10 Allen (Mass.), 228.

⁴ [*Herrman v. Merchants' Ins. Co.*, 44 N. Y. Super. 444, 453.]

⁵ [*Whitney v. Black River Ins. Co.*, 9 Hun, 37, 42.]

pancy.¹ Leaving a dwelling furnished and in charge of his farmer who occupied the farmhouse near by, and whose wife visited and aired the dwelling every few days, will not satisfy the condition of occupancy. The house must be used by human beings as their customary place of abode.² In case of a saloon it is enough if at the time of loss a clerk having charge of the building was occupying it with appropriate furniture, fitting it up for business and sleeping in it.³ A purpose to move into the house, though partly executed by filling it with furniture, will not aid the assured unless the purpose is rendered complete by actual occupancy. If the premises become unoccupied and remain so up to and at the time of the fire, the condition is broken.⁴ A condition in a policy of insurance on a hog-house that the policy should be void if the premises became vacant by the removal of the owner or occupant, refers to the human occupant of the whole premises to which the hog-house belongs, and not to the absence of hogs, of the four legged variety.⁵ Where the occupant moved out leaving only a bedstead and a strip of carpet, and one of his sons slept in the house for a month after, but afterward the house was entirely abandoned for six or seven weeks before the fire, the court held the premises vacant, and the policy void not only as to the house but also as to all the farm buildings insured, since the condition as to occupancy of the premises applies to all the subjects of the contract, and has a potent influence on the assumption of the entire risk.⁶ If the policy covers several buildings, as a dwelling and outbuildings, the fact that the outbuildings remain occupied will not save the contract if the dwelling becomes vacant; the condition is to be applied distributively.⁷

¹ [Bonenfant v. Insurance Co., 76 Mich. 654, 659, citing 55 Mich. 292, and Ashworth v. Insurance Co., 112 Mass. 422.]

² [Herrman v. Adriatic Fire Ins. Co., 85 N. Y. 162.]

³ [Stensgaard v. National Fire Ins. Co., 36 Minn. 181.]

⁴ [Barry v. Prescott Ins. Co., 35 Hun, 601, 604-605.]

⁵ [Kimball v. Monarch Ins. Co., 70 Iowa, 513.]

⁶ [Hartshorne v. Agricultural Ins. Co., 50 N. J. 427, 429.]

⁷ [Herrman v. Adriatic Fire Ins. Co., 85 N. Y. 163.]

[§ 249 B. **Vacancy not per se an Increase of Risk under Ordinary Circumstances.** — Ordinarily vacancy is not such an increase of risk as will avoid a policy, without express agreement to that effect.¹ A building occupied as a dwelling-house one quarter mile away from any other dwelling, was insured as a dwelling-house, but for more than a year prior to its destruction by fire was untenanted. This was held not to violate a condition in the policy, reading "Any material increase of the risk shall avoid the policy."² No inquiry being made, a failure to state that the dwelling insured is vacant is not breach of the condition avoiding the policy for the omission of anything material to the risk.³ When the policy contains no stipulation or condition against vacancy of the insured premises it is incompetent to ask an expert if the risk on a dwelling-house is increased by its vacancy.⁴ And it is error to charge that if the house was vacant and *if you believe the risk was thereby increased*, the policy is void.⁵ But where a dwelling-house was abandoned by the assured, and an intruder came in and used it for a liquor saloon during which use it was burned, the policy was avoided by the increase of risk.⁶ A mere casual vacancy caused by the difficulty of procuring a tenant for the insured house, ought not to work a forfeiture of a policy⁷ as an increase of risk, and it is understood that in the absence of a warranty the companies expect to cover such cases of temporary vacancy. If a house is insured as a tenement, temporary vacancies are contemplated by the parties as a part of the risk.⁸ In a later case the court held that although the house was described as occupied by a tenant, yet the leaving of the tenant at six o'clock in the evening

¹ [Becker v. Farmers' Mut. Fire Ins. Co., 48 Mich. 610 ; Residence Fire Ins. Co. v. Hannawold, 37 Mich. 103, 107.]

² [Gilliat v. Pawtucket Mut. Fire Ins. Co., 8 R. I. 282, 293.]

³ [Browning v. Home Ins. Co., 71 N. Y. 508, 511.]

⁴ [Liverpool, &c. Ins. Co. v. McGuire, 52 Miss. 227, 232.]

⁵ [Insurance Co. v. Long, 51 Tex. 89.]

⁶ [Western Ass. Co. v. McPike, 62 Miss. 740.]

⁷ [Schultz v. Merchants' Ins. Co., 57 Mo. 331, 337.]

⁸ [Lockwood v. Middlesex Mut. Ins. Co., 47 Conn. 553. See also Insurance Co. v. Hannum, 11 Monaghan (Pa.), 369.]

avoided the policy at once, and no recovery could be had for a loss occurring at two o'clock the next morning.¹ The cases differ in the fact that in the former there was no specific provision that the policy should be void by vacancy, while in the latter there was such a provision. In the early case the vacancy could only avoid the policy as an increase of risk not contemplated by the parties. In a still later hearing of the Bennett case it was held that the policy was not saved by the fact that the fire had actually commenced, and was smouldering unobserved when the tenant moved out.²

[§ 249 C. *Vacant*. — A vessel hauled up on the beach and left alone is "unoccupied."³ A house that remains three months vacant and is then let to a tenant who up to the loss had done nothing but put into it implements for cleaning, is unoccupied within the meaning of the policy.⁴ When a policy provided that if the insured house should be "vacant or unoccupied" it should be void, it was held that a vacation of five days during the time only, that was necessary for the changing of tenants of the assured, when the fire occurred within that time, avoided the policy.⁵ Leaving a few articles in the house, and non-delivery of the key by the outgoing tenant to the owner, will not save the vacancy.⁶ The mere presence of goods in the house and a supervision over it is not an "occupancy." That requires a "living" in it.⁷ Where the tenant moved out September 26 and a fire occurred October 1st, and the owner who lived a mile and a half away had spent a part of each intervening day in cleaning the house, but did not stay there at night, the house was held vacant.⁸ Occupation of the *land* on which the building

¹ [Bennett v. Agr. Ins. Co., 50 Conn. 420.]

² [51 Conn. 504.]

³ [Reid v. Lan. Fire Ins. Co., 90 N. Y. 382.]

⁴ [Litch v. North British, &c. Ins. Co., 136 Mass. 491.]

⁵ [Ridge v. Insurance Co., 9 Lea, 507, 515.]

⁶ [American Ins. Co. v. Padfield, 78 Ill. 167; Corrigan v. Conn. Fire Ins. Co., 122 Mass. 293, 300.]

⁷ [Craig v. Springfield Fire & Mar. Ins. Co., 34 Mo. App. 481; Moore v. Insurance Co., 64 N. H. 140; Sonneborn v. Insurance Co., 44 N. J. 220.]

⁸ [Feshe v. Council Bluffs Ins. Co., 74 Iowa, 676.]

is situated is not enough. The word "premises" in the vacancy clause refers to the house.^{1]}

[§ 249 D. *Not Vacant*. — Temporary absence of the dweller or tenant on the night of the fire is not a vacancy.² A temporary absence from Wednesday till Monday to attend a funeral is not a vacating of the premises that will avoid the policy.³ It is sufficient for occupancy if a single person remains in the house, though described at the time of insurance as a "family residence."⁴ Mere sleeping in an adjoining house, if by day the assured lives in the insured premises, will not break the "vacant or unoccupied" condition in a policy.⁵ When the assured had taken possession of the house for the purpose of permanent occupancy, had moved in her furniture and goods, and was cleaning up the house preparatory to living in it, it was held that the house was not "vacant or unoccupied" ⁶ although she slept in a building a few rods distant, and did not eat or sleep in the house, and after a few days went off on a business trip during which the house was burned.⁷ Where a tenant moved out on Tuesday, and the landlord on Wednesday took possession with his servants and began clearing and moving goods into the building until Friday night, intending to have the family fully domiciled there on Saturday, but on Friday night the house burned, it was held that the house was not vacant.⁸ When a "ten tenement frame block" has two of its tenements occupied, it is not "vacant or unoccupied" so as to break that condition in a policy.⁹ A grain elevator, though at times not in use, is not vacant when men are in and out all the time and the owner keeps his papers there.^{10]}

¹ [Sexton v. Hawkeye Ins. Co., 69 Iowa, 99.]

² [Lasselle v. Insurance Co., 43 N. J. L. 468.]

³ [Franklin Fire Ins. Co. v. Kepler, 95 Pa. St. 492.]

⁴ [Imperial Fire Ins. Co. v. Kiernan, 83 Ky. 468.]

⁵ [Gibbs v. Continental Ins. Co., 13 Hun, 611, 620.]

⁶ [Shackelton v. Sun Fire Office, 21 N. W. Rep. 343, 345.]

⁷ [Shackelton v. Sun Fire Office, 55 Mich. 288.]

⁸ [Eddy v. Hawkeye Ins. Co., 70 Iowa, 472.]

⁹ [Harrington v. Fitchburg Ins. Co., 124 Mass. 126, 129.]

¹⁰ [Williams v. North German Ins. Co., 24 Fed. Rep. 625 (Iowa), 1885.]

[§ 249 E. **Vacant and so Remain.**— Under a condition that “if the assured shall allow the building to become vacant and unoccupied and remain so,” the policy shall be void, the mere occurrence of a vacancy does not forfeit the policy; the building must *remain* vacant. If, however, it is not occupied within a reasonable time, the company may declare the contract forfeited. If the company does not exercise its power during the breach of condition and the premises again become occupied, its right to declare a forfeiture ceases. In relation to such a clause, knowledge of the agent at the time of consenting to a transfer, that the premises were vacant, but without proof of consent that they should remain so, could not estop the company in a case where the building was vacant twenty months and then destroyed by fire.¹ A clause stating that if the insured house “become unoccupied or vacant and so remain” means so remain until the fire.² And a vacancy cannot avail the company if it ceased before loss.³

[§ 249 F. **Tenant's Removal.** Diligence of assured does not enter the question unless so expressed, where the policy is to be void if the premises become vacant. It is error to instruct that if the insured used due diligence to keep the building occupied the policy was not avoided.⁴ The permanent removal of a lessee, though during his lease and without knowledge of the insured, will be fatal under the ordinary provision.⁵ But where the policy was to be void “if the premises shall be used or occupied so as to increase the risk, or be or become vacant or unoccupied, or ——— or ——— or ———, or by any means within the knowledge and control of the assured,” it was held that the latter clause modified all the preceding, and that the removal of a tenant on the day of the fire without knowledge of the insured did not avoid the policy.⁶ When a policy prohibits

¹ [Insurance Co. v. Garland, 108 Ill. 220.]

² [Laselle v. Insurance Co., 43 N. J. L. 468, 469.]

³ [Laselle v. Insurance Co., 43 N. J. L. 468.]

⁴ [Niagara Fire Ins. Co. v. Drda, 19 Brad. 70.]

⁵ [Insurance Co. v. Wells, 42 Ohio St. 519, 521.]

⁶ [American Cent. Ins. Co. v. Clarey, 28 Brad. 193.]

the vacation of the insured house by the insured's consent, it is incumbent on the assured to prove that such a vacation when established, was beyond his control, before he can recover.^{1]}

[§ 249 G. **Answer; Reoccupancy before Fire; Unreasonable Condition; Prior By-law; Maine Statute.** — An answer in the application clearly false as to the occupancy of the premises will prevent recovery.² A policy once avoided by non-occupancy for ten days, will not be revived by reoccupation.³ A lot of distillery buildings, presumably available for no other use, and unoccupied at the time of the insurance of the policy, were insured, the policy stating that it should be avoided by vacancy or disoccupancy, but expressly covering a carpenter's risk, and also expressly prohibiting the distillery business. The carpenter's work was finished before the expiration of the policy and the buildings remained unoccupied, but it was held that the company would not be heard to say that the policy was forfeited.⁴ Practically the condition forfeited the policy in any event. If the property was used for a distillery there was forfeiture. It could not probably be used for anything else, and yet if it was not forfeiture also would result, — a condition too unreasonable to stand. By-laws cannot destroy express contracts. Existing regulations enter into the agreement, but although a policy is declared to be subject to the charter and by-laws, a by-law to the effect that policies shall cease on twenty days' vacancy of the building insured does not affect a policy issued prior to its enactment.⁵ By the Maine statute, vacating a building will not affect the policy unless the risk is materially increased thereby.^{6]}

[§ 249 H. **Express Waiver.** — When the assured moved out of the insured premises more than thirty days before the fire occasioning the loss, in violation of the stipulations of the

¹ [North American Fire Ins. Co. v. Zaenger, 63 Ill. 464, 466.]

² [Mullin v. Vt. Mut. Fire Ins. Co., 54 Vt. 223.]

³ [Moore v. Insurance Co., 62 N. H. 240.]

⁴ [Alkan v. New Hampshire Ins. Co., 53 Wis. 136, 142.]

⁵ [Becker v. Farmers' Mut. Fire Ins. Co., 48 Mich. 610.]

⁶ [Thayer v. Providence, &c. Ins. Co., 70 Me. 531, 538.]

policy, but at the time went to the secretary of the company and notified him of the same, he replying "We waive all that," it was held that the policy was good.¹ A general agent is presumed to have authority to insert in the policy permission that the premises may be vacant for a certain time.² And he may do the same orally, although the policy requires indorsement, or even bind the company as to future vacancies by modifying the contract.

A general agent of an insurance company may waive the performance by the insured of conditions in the policy, and bind the company by such waiver. Hence, when the policy declared that a waiver of the "vacant or unoccupied" clause should not avail unless indorsed on the policy, a general agent by verbal agreement with the insured was held to have legally waived this condition.³ In this case the general agent told the insured distinctly that it was not necessary to have the matter indorsed on the policy. Where premises were not to be left unoccupied, but on the day a vacancy occurred a general agent of the company, being told of it, wrote in the policy, "The dwelling-house being unoccupied for a short time, but being in charge of a trusty person living near by, shall be no prejudice to the policy," it was held that this was a modification of the contract that covered other vacancies afterward occurring.⁴ In one case, a farm tenant left, and the owner told the agent that his men would work the farm with other land, moving from farm to farm, and while on the farm in question would live in the buildings thereon. The agent then indorsed on the policy, "It is understood that the buildings insured hereunder are now occupied for dwelling and farming purposes." It was held that the premises were not occupied within the meaning of the indorsement. Taylor and Orton, JJ., however dissented, and with much reason. It is absurd to allow an agent to make an indorsement expressly to announce that a

¹ [Adams v. Greenwich Ins. Co., 9 Hun, 45, 48.]

² [Continental Ins. Co. v. Ruckman, 127 Ill. 364.]

³ [Walsh v. Hartford Fire Ins. Co., 9 Hun, 421, 423.]

⁴ [Steen v. Niagara Fire Ins. Co., 89 N. Y. 315.]

certain state of facts shall be considered an occupancy, and then hold that state of facts *not* an occupancy within the meaning of the agent's indorsement.¹ A permission to leave a house vacant during the "summer" will be construed in its broadest sense, and as equivalent to "farming season."²

[§ 249 I. **Knowledge of Agent.**³ — If at the time of loss the occupancy of the premises is in the same condition as was known to the agent at the time of insurance, the company is estopped even though the applicant ignorantly signed an application filled in by the agent containing an erroneous statement on the subject. But if the premises once become occupied after insurance, the condition takes effect, and if the agent on knowing of a vacancy occurring after insurance *tells the assured* that it will invalidate the policy, or he is *merely silent*, the company is not estopped. Nor will knowledge that a vacancy will be likely to occur, as in case of a tenement or summer-house, estop the insurer.

If the agent knew the house was vacant when insured, the company cannot claim a forfeiture under the occupancy clause.⁴ Knowledge of the agent is knowledge of the principal, and if the agent knows the house is vacant at the time of issuing the policy and receiving the premiums, the condition of the policy against vacancy is waived.⁵ Although the house was occupied by children only, a part of each week, and was actually vacant at the time of the fire, yet as its occupancy was in the same condition as it was at the time of the insurance, which condition was then known to the agent, it was held that the provision as to vacancy was waived.⁶ Where the applicant stated that the premises were unoccupied, but when occupied it was by a tenant, and the agent wrote in the application that the premises were

¹ [Fitzgerald v. Conn. Fire Ins. Co., 64 Wis. 463.]

² [Vanderhoff v. Agricultural Ins. Co., 46 Hun, 328.]

³ [See also § 246 A, and ch. 7, anal. 5.]

⁴ [Germania Fire Ins. Co. v. Klewer, 27 Brad. 590 ; aff'd in 129 Ill. 599.]

⁵ [Sentell v. Oswego County Farmers' Ins. Co., 16 Hun, 518 ; Jordan v. State Ins. Co., 64 Iowa, 216.]

⁶ [Vanderhoff v. Agricultural Ins. Co., 46 Hun, 328.]

occupied by a tenant, and the application was signed by the insured without knowledge of the misstatement, it was held that the policy was not void, under the clause against vacancy without assent; that the company must be held to have known of the non-occupancy; that the policy really was an insurance of unoccupied premises; that it was proper to amend the application so as to make it conform to the insured's statement to the agent; and that a subsequent vacancy after an intervening tenancy would not avoid the policy, as it insured the building vacant.¹ It is error not to submit to the jury the question of the knowledge of the agent that the premises were vacant and unoccupied at the time of issuing the policy, contrary to its provisions, for such knowledge may estop the company. The law will not impute the fraudulent intent involved in delivering and receiving pay for an instrument known to be invalid.² But although a building may be unoccupied when insured, being a new house insured a few days before completion and described as a "dwelling-house, when completed to be occupied as a private dwelling-house," yet, if it is once occupied, and then left vacant for fourteen days without consent of the insurer, during which time a fire occurs, the condition against vacancy is broken.³ An agent of a foreign company may indorse consent of the company to non-occupancy, or he may waive such indorsement by appropriate acts, but mere silence with knowledge of the fact is not a waiver.⁴ Where, on renewing a policy the agent was told that the premises were unoccupied, and he replied that the policy would be of no effect unless the house should be occupied when a fire occurred, and a loss occurred one week after while the premises were still vacant, it was held that the plaintiff could not recover.⁵ Knowledge of the agent at the time of insur-

¹ [Bennett v. Agricultural Ins. Co., 106 N. Y. 243.]

² [Short v. Home Ins. Co., 90 N. Y. 16. See also Haight v. Continental Ins. Co., 92 N. Y. 51.]

³ [Lubelsky v. Royal Ins. Co., 86 Ala. 530; Royal Ins. Co. v. Lubelsky, 15 Ins. L. J. 868 (Ala.), April 9, 1889.]

⁴ [Davey v. Glens Falls Ins. Co., 9 Ins. L. J. 494 (Minn.), 1879.]

⁵ [Hotchkiss v. Home Ins. Co., 58 Wis. 297.]

ance, that the house although then occupied was only used as a summer residence, will not relieve the insured from the effect of a subsequent vacancy.¹ And so, though it is known that the house was leased to tenants, and might become vacant by the occasional change of occupants.² The true meaning of such clauses is that the policy is to be void during the vacancy.]

[§ 249 J. **Condition that Agent shall not waive.** — A provision that no agent can waive conditions will not prevent waiver of a vacancy known by the agent and treated as not avoiding the policy.³ (a) But one having only authority to make surveys and receive applications cannot waive a vacancy of the premises in such a case.⁴]

§ 250. **Limitation of Risk; Care; Watch.** — The cases upon the effect of a statement as to circumstances material existing at the time of the making of the contract are perplexingly conflicting.

On the one hand, they are held to be mere statements of existing facts, for the truth of which alone the applicant is responsible, and not warranties that the existing status shall continue. So it has been held with reference to a statement that a mill "is never left alone, there being always a watchman left in the building when it is not running,"⁵ that an account of stock is taken once in three months.⁶ On the other hand, it has been distinctly and repeatedly held that a statement that a watchman is kept on the premises at night and all other times when the mill is not in operation, or when the workmen are not present, is a warranty that the practice shall continue.⁷ The same doctrine was held also

¹ [Herrman v. Adriatic Fire Ins. Co., 85 N. Y. 163.]

² [Ridge v. Insurance Co., 9 Lea (Tenn.), 507.]

³ [Lamberton v. Conn. Fire Ins. Co., 39 Minn. 130.]

⁴ [Thayer v. Agricultural Ins. Co., 5 Hun, 566.]

⁵ Worswick v. Canada Fire Ins. Co., 3 App. Rep. (Ont.) 487; s. c. 15 Can. L. J. N. s. 22 (1879).

⁶ Wynne v. Liverpool, &c. Ins. Co., 71 N. C. 121; *ante*, §§ 191, 231; *post*, §§ 255, 256.

⁷ Whitlaw v. Phoenix Ins. Co., 28 U. C. (C. P.) 53; Blumer v. Phoenix Ins. Co., 45 Wis. 622. In this case there was a dissenting opinion, and the whole

(a) See Anderson v. Manchester F. Ass. Co., 59 Minn. 182.

in another case in Wisconsin,¹ where the statement was that the machinery was "regularly oiled with lard and sperm oil by the engineer and miller." But as the statements were to be true only so far as material to the risk, the case was allowed to go to the jury, on the question whether the use of a different oil by a different person was a violation of the agreement.² In another very late case,³ the very unsatisfactory condition of the law upon this point was thus stated: "It is impossible to reconcile the decisions upon this question of a continuing warranty. When an underwriter asks about the particulars of a risk, he probably takes it for granted that things will remain as they are; but when the courts are asked to convert this impression into a covenant, and make words in the present tense operate as a stipulation for the future, there is difficulty, and the authorities are doubtful and divided. The result, so far as I can gather it, is that when the fact appears to the courts to be a very important one, such as the employment of a watchman, a majority of them have said that this ought to be considered a part of a continuing engagement. When the fact does not appear to be so important, as that a dwelling-house is occupied, or that a clerk sleeps in the store, it is not of that character." It is obvious that the test here given — the greater or less importance of the fact — is practically no test at all; and it is to be regretted that there has been any departure from the salutary rule that the courts will not find warranties where the parties have not clearly made them. It would have been fortunate if they had found more difficulty in converting "impressions" or expectations into covenants.⁴

subject was very elaborately discussed, especially in the dissenting opinion, and upon reargument the decision was affirmed. 9 Ins. L. J. 444. See also *May v. Buckeye Ins. Co.*, 25 Wis. 291.

¹ *Redman v. Hartford Fire Ins. Co. (Wis.)*, 9 Ins. L. J. 222. See also *Garcelon v. Insurance Co.*, 50 Me. 580.

² See also *post*, §§ 251, 252; *Miller v. Germania Fire Ins. Co.*, C. C. P. (Pa.), 6 Ins. L. J. 373; *Quin v. National Ass. Co., J. & C. (Irish)* 316; s. c. 1 Bennett Fire Ins. Cas. 689.

³ *Albion Lead Works v. Williamsburg City Fire Ins. Co.*, C. Ct. (Mass.), Lowell, J., 2 Fed. Rep. 479.

⁴ See *ante*, § 191. *National Bank v. Insurance Co.*, 95 U. S. 673, 678; *Gerhauser v. North British, &c. Ins. Co.*, 7 Nev. 174.

When it is warranted that a watchman shall be kept on the premises, this means that a watchman is to be kept in the manner in which men of ordinary care and skill in similar departments keep a watchman; and to show this, evidence of the usage in similar establishments may be introduced. A substantial compliance, though not a constant watch, uninterrupted either by unknown accident or negligence, is required.¹ (a) And an occasional leaving of the premises to look after property on the opposite side of the street is no breach of the warranty.² And if the watchman is within the enclosure he is "on the premises."³ What is a "suitable watch" depends upon the circumstances.⁴ In Massachusetts, the questions arose in *Parker v. Bridgeport Insurance Company*,⁵ what constituted a good,

¹ *Crocker v. People's Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 79.

² *Hovey v. Am. Mut. Ins. Co.*, 2 Duer (N. Y. Superior Ct.), 554.

³ *Andes Ins. Co. v. Shipman*, 77 Ill. 189.

⁴ *Percival v. Maine Mut. Ins. Co.*, 33 Me. 242.

⁵ 10 Gray (Mass.), 302. The case was thus stated by Shaw, C. J. :—

"In a policy of insurance upon a saw-mill, the assured covenanted 'that the representation given in the application for this insurance contains a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured, so far as the same are known to the assured and material to the risk; and that if any material fact or circumstance shall not have been fully represented, the risk hereupon shall cease and determine, and the policy be null and void.' The applicant, to the questions, 'Is a watch kept upon the premises during the night? Is any other duty required of the watchman than watching for the safety of the premises?' answered, 'A good watch kept; men usually at work. Watchmen work at the saws;' and answered in the negative this question: 'Is the building left alone at any time after the watchman goes off duty in the morning till he returns to his charge in the evening?' In fact, no watch was ever kept on the premises after twelve o'clock on Saturday, or at all on Sunday, night, other than the workmen sleeping there, who were instructed to, and habitually did examine the mill with reference to fires before going to bed; and the fire occurred on Sunday night, when no one was

(a) See *London & Lancashire F. Ins. Co. v. Gerteson* (Ky.), 51 S. W. 617. The words "constant watch" in a policy may amount to a description of the risk, and, if so, under a statute like that of the State of Maine, they constitute a representation and not a warranty. *Day v. Dwelling-House Ins. Co.*, 81 Maine, 244. And where property so insured was situated in Maine, and the policy was there issued, it was elsewhere construed

by the law of that State. *King Brick Manuf. Co. v. Phoenix Ins. Co.*, 164 Mass. 291. "Constant watch" required by a fire policy may thus relate to a permanent or habitual change in the use or occupation of the property, and not to the temporary absence of a watchman without the insured's knowledge. *King Brick Manuf. Co. v. Phoenix Ins. Co.*, 164 Mass. 291.

suitable, or proper watch, and whether such a one was kept, at the times required by the terms of the contract; they were held to be questions for the jury.

§ 251. **Limitation of Risk; Care of Premises; Watchman.** — Several other cases upon the meaning of a warranty to keep

on the premises. The inquiry is not as to watchman or watchmen; the more generic term 'watch' embracing the various modes of watching such a factory. It was a factory the machinery of which was driven by water; no steam was used; it was not a manufactory of metals, or one that required the use of fire. Upon an examination of the bill of exceptions, it appears to us that there were several points ruled positively as matter of law which should have been left to the jury; and this on several grounds. In the first place, if there was not an absolute stipulation that a watch should be kept during the whole of every night in the week, such a watch as would be necessary and proper to the safety of such an establishment against fire, then it was a question of fact whether the watch actually kept was or not a good and suitable watch. (*Crocker v. People's Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 79. See also *Jones Manufacturing Co. v. Manufacturers', &c. Ins. Co.*, 8 Cush. (Mass.) 82; *ante*, § 188.) If there is a real difference between the requirement of a watch immediately after a working day, and Sunday, which is a day of rest, then a watch might be deemed good and adequate on Sunday night, which might not be after a working day. The causes of danger of fire in a factory, we suppose, are lamps and stoves, after work is done; friction, arising from the great velocity and irregular action of working machinery; spontaneous combustion; incendiaries; and lightning. The last, of course, no watch could affect; the three first, perhaps the greatest, would be likely to disclose themselves within a few hours after the close of work, and therefore would seem to exist in a less degree on Sunday night. If there was ground to except Saturday night, when the workmen, charged as watchmen, examined the premises after the close of business, having an interest in the safety of a building in which they slept, or if there was ground to except Sunday night, after a day in which no work had been done, then it was incorrect to charge the jury that it was the duty of the assured to have a person to keep a good watch in the building during the whole of Saturday and Sunday nights; otherwise they could not recover. But suppose the sixteenth question and answer, by their proper construction, could be held to be a representation that the plaintiffs had been accustomed to keep, and would in future keep, a watch on the premises every night during the week, including Sunday and Saturday, still the stipulation that this was a just and true exposition is not absolute, but only *sub modo*; the contract is, that is, so far as they are known to the assured, and are material to the risk. The question therefore is, not only whether the assured was substantially to comply with his stipulation that the representation is true and just, but whether such compliance was material to the risk. This is a question of fact, to be decided by the evidence. The insurer may prescribe any conditions to his undertaking that he pleases, and if he makes insurance on condition that a constant watch shall be kept on the premises, otherwise the policy shall cease and be void, then if the assured fails to comply with the conditions, his policy is to cease, and no question can be made whether compliance affected the risk in any way. But when such condition is qualified by the limitation that it is a failure dependent on the question whether it is material to the risk, it opens that question in each particular case."

a watchman nights have been before the courts. In Connecticut it has been held that an answer to the question, "Is there a watchman in the mill during the night?" that "There is a watchman nights," carries with it an obligation to keep a watchman in the mill every night in the week. So that if it is left without a watchman on Sunday morning, it is a breach of the contract which avoids the policy.¹ And substantially the same doctrine has been laid down in New York, where it has been held that a statement in answer to a specific question, that there is a watchman nights, though followed by a statement that the mill is left alone after the watchman goes off duty in the morning, at meal times, and on the Sabbath, and other days when the mill does not run, requires that there should be a watchman on the premises as late after shutting down on Saturday night as three or four o'clock the next morning, and that loss by fire occurring at that hour in the morning, in the absence of a watchman, is not covered by the policy.² Whether a warranty that a watchman is to be on duty at all times is violated by the watchman going to his meals, there being no exception of such absence, has been held to be a question for the jury.³ But where the mill was said to be constantly worked, and in answer to a question whether a watch was kept, it was said that there was "none, except people working in the mill during the night," it was held that this did not amount to a stipulation that the mill should be run every night, or on the Sabbath.⁴

§ 252. **Limitation of Risk; Watchman; Excuse for Absence.**

— In *First National Bank of Ballston v. Insurance Company of North America*, it appeared that the following interrogatory was propounded to the insured: "Watchman, — Is one kept in the mill or on the premises during the night, and at all times when the mill is not in operation, or when the

¹ *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn. 235; *Glendale Manuf. Co. v. Prot. Ins. Co.*, 21 id. 19. See also *ante*, § 188. But see *Ripley v. Astor Ins. Co.*, 17 How. Pr. (N. Y.) 444.

² *Ripley v. Etna Ins. Co.*, 30 N. Y. 136, reversing s. c. 29 Barb. (N. Y.) 550.

³ *Gibson v. Farmers', &c. Ins. Co.*, 1 Cin. Sup. Ct. 410.

⁴ *Prieger v. Exchange Ins. Co.*, 6 Wis. 89.

workmen are not present?" Answer: "Yes." And this was held to be a warranty; and that the fact that the day before the fire the sheriff levied execution on the personal property in the mill, excluding and locking the doors against the employees, was no excuse for a breach; nor could the deputy sheriff in custody, or a trustee of the insured, both of whom were together in the office of the mill, some two rods from it, but who did not in fact keep watch, be considered a watch within the meaning of the policy.¹ [Having a man sleep on the premises is not a compliance with a warranty to keep a watchman.² A man who works in the mill by day and sleeps at night too far away from the mill to see it, does not fulfil the conditions of a policy requiring a watchman to guard the premises when idle.³ A warranty to keep a watchman on the premises insured is fulfilled if, at the time of the loss, a watchman is on the premises connected with the mill, and in a better position to watch the mill than if he were in it.⁴ (a)]

¹ 50 N. Y. 45.

² [Brooks v. Standard Fire Ins. Co., 11 Mo. App. 349.]

³ [Wenzel v. Com. Ins. Co., 67 Cal. 438.]

⁴ [Sierra Milling, &c. Co. v. Hartford Fire Ins. Co., 76 Cal. 235.]

(a) This case was decided under § 2629 of the Cal. Civil Code, which provides that "an insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of his agents or others." A late decision holds that this statute, and a clause in the policy providing that "one or more watchmen shall be on duty constantly, day and night, in and immediately about the said buildings or works," are not complied with by having a day employé sleep in a house three hundred and fifty yards from the insured saw-mill and visit it twice at night, it not being fully visible from the house. *McKenzie v. Scottish Union & N. Ins. Co.*, 112 Cal. 548, 559; *Rankin v. Amazon Ins. Co.*, 89 Cal. 203. But as the word "watchman" is indefinite in meaning,

and watchmen are employed against all dangers, and not merely against fire, the word is to receive a reasonable construction, and the court cannot in every case pass upon the word or his care, as matter of law, without adding to the contract. *Power v. City F. Ins. Co.*, 8 Phila. 566; *Parrish v. Virginia F. & M. Ins. Co. (N. C.)*, 20 Ins. L. J. 95; *Plyer v. German-Am. Ins. Co.*, 121 N. Y. 689; 31 N. Y. St. Rep. 836. A foreman who with his men kept watch of a vacant mill, which was close to the adjacent yard where they worked, was held to be a "watchman," though he could, when at work, see only one side of the mill, and not into it. *Spies v. Greenwich Ins. Co.*, 97 Mich. 310 (Grant, J., dissenting); *Au Sable Lumber Co. v. Detroit M. M. F. Ins. Co.*, 89 id. 407.

§ 253. **Limitation of Risk; Working of Mills.** — An answer to the question, "During what hours is the factory worked?" stating that it is "usually" worked certain hours in the summer, and certain other hours in the winter, and adding, "Short time now," is, it seems, no warranty that the mill shall not run at other hours.¹ [If the policy and application are silent as to the number of hours the mill is to run, the policy will not be affected by running it over hours.²] "Constantly worked" means worked during the usual and customary working hours and days in the particular business with reference to which the language is used.³ In *Mayall v. Mitford*,⁴ it was said that where certain mills were warranted to be worked by steam, and by day only, it was not enough to invalidate the policy to show that the engine was kept running by night, but it must also appear that the mills were kept going. The words "worked by day only" refer to the mills, not the engine, and it is no breach of the warranty that the engine is kept going all the time.⁵ (a)

¹ *North Berwick Co. v. N. E. Fire & Mar. Ins. Co.*, 52 Me. 336.

² [*German-American Insurance Co. v. Steiger*, 109 Illinois, 254. See last case in § 251.]

³ *Prieger v. Exchange Mut. Ins. Co.*, 6 Wis. 89.

⁴ 6 Adol. & Ell. 670.

⁵ [*Whitehead v. Price*, 2 Cr. M. & R. 447, 454. The words "worked by day only," in a policy, mean, working in its popular sense, not a mere turning of shafts without any practical results. *Whitehead v. Price*, 5 Tyrw. 825, 832.]

(a) The insurer has the right to stipulate against the cessation of the running of a mill without its consent, and for the care and supervision of skilled workmen necessarily employed in running it during the customary working season; in such case, if watchmen are substituted for workmen, the policy is voidable at the insurer's option. See *Dover Glass-Works Co. v. American F. Ins. Co.*, 1 Marvel (Del.), 32; *City Planing & Shingle Mill Co. v. Merchants' Mut. F. Ins. Co.*, 72 Mich. 654; *Stone v. Howard Ins. Co.*, 153 Mass. 475; *Cronin v. Phila. Fire Ass'n* (Mich.), 82 N. W. 45; *American F. Ins. Co. v. Brighton Cotton Manuf. Co.*, 125 Ill. 131; *Poss v. Western Ass. Co.*,

7 Lea (Tenn.), 704. So if the policy expressly provides that the mill shall not be run after 10 P.M., and it is run later, there is a forfeiture, especially when a larger premium is charged for running it at night. *Alsbaugh v. British-American Ins. Co.*, 121 N. C. 290. A condition avoiding a policy upon a manufactory if it ceases to be operated for more than ten consecutive days, does not apply to a temporary stoppage of machinery from such causes as sickness, breakage, or low water, or the freezing of the mill-race. *Ladd v. Aetna Ins. Co.*, 147 N. Y. 478; *Bellevue Roller-Mill Co. v. London & L. F. Ins. Co.* (Idaho), 39 Pac. 196.

[§ 253 A. **Mills; Provisions against Stoppage.** — The condition against ceasing to operate a factory is not broken by a temporary suspension caused by an epidemic,¹ or for repairs which were permitted by the policy; nor by a temporary suspension of *parts* of the business, the rest continuing; nor by such a stoppage of all work as may result from want of materials.² But when the policy declares its suspension by stoppage of the mill insured for more than twenty days from any cause whatever, without notice to the company, a stoppage for necessary repairs is within the provision.³

[§ 253 B. **Mills; Agent's Knowledge before Issue of the Policy.** — If at the time of the fire a factory is operated in the same manner as it is known to be at the time of insurance, the policy will not be void under the clause against ceasing operations, although the operation at both times named was only a very slight one.⁴ Knowledge of the agent at the time of issuing the policy, no matter how obtained, is knowledge of the company. If the agent knows that a factory insured is to run at night and be lighted by kerosene, the policy will not be void by keeping kerosene for that purpose, contrary to its provisions.⁵ The knowledge of the general agent who countersigned and delivered the policy on a distillery, that it had always been run at night, is a waiver of the condition against night running.⁶ But notice at the time of issuing the policy of an *intention* to do an act in the future does not ripen into knowledge of the existing fact, even when the specified period has passed, nor will verbal consent of the company before issue of the policy, that such an act may be done in the future, estop it.⁷ And in Massachusetts, in harmony with the decisions of that State, spoken of in § 145 *et seq.*, it is held that if a factory

¹ [Poss *v.* Western Assurance Co., 7 Lea (Tenn.), 704, 707.]

² [American Fire Ins. Co. *v.* Brighton Cotton Manuf. Co., 125 Ill. 131.]

³ [Day *v.* Mill Owners' Mut. Fire Ins. Co., 70 Iowa, 710.]

⁴ [Lebanon Mut. Ins. Co. *v.* Erb, 112 Pa. St. 149.]

⁵ [Couch *v.* Rochester German Fire Ins. Co., 25 Hun, 469; Woodward *v.* Republic Fire Ins. Co., 32 Hun, 365.]

⁶ [American Cent. Ins. Co. *v.* McCreary, Maury, & Co., 8 Lea (Tenn.), 513.]

⁷ [McNierney *v.* Agricultural Ins. Co., 48 Hun, 239.]

is run at night in violation of a provision in the policy the latter is avoided, and oral evidence that similar establishments were usually so run and could not be successfully carried on otherwise, and that the company's agent knew these facts when he fixed the premium, is not admissible.¹

§ 254. **Limitation of Risk; Examination after Work.** — In *Houghton v. Manufacturers' Mutual Fire Insurance Company*,² the court elaborately discussed the meaning and effect of a statement that the premises insured were examined after work, both as to what constitutes an examination and when it should take place, that is, what point of time is designated by the words "after work." Such statement was held to be an executory representation, amounting to a stipulation that the examination should continue during the term of the insurance.³

¹ [*Reardon v. Faneuil Hall Ins. Co.*, 135 Mass. 121.]

² 8 Met. (Mass.) 114.

³ The opinion of Shaw, C. J., upon this point was as follows: "One other point was taken, respecting which an opinion was asked for and given at the trial. It related to the representation and the practice in respect to the examination of the factory. The representation was contained in the answer to the fourteenth question, as follows: 'Is a watch kept constantly in the building? If no watch is constantly kept, state what is the arrangement respecting it.' Answer: 'No watch is kept in or about the building; but the mill is examined thirty minutes *after work*.' This question referred to the requirements of the office on the last of the representations, amongst which is this, viz., that an examination will be had, say thirty minutes after work. Question 21 was this: 'During what hours is the factory worked?' The answer was: 'From 5 o'clock A. M. to 8½ o'clock P. M. Sometimes extra work will be done in the night.' Two questions were made at the trial. First, whether the representation of the usual practice amounted to a condition or stipulation that it should be continued. It was ruled at the trial, and the whole court are now of opinion, that as this examination was manifestly intended as a substitute for a constant watch; as it was one which the assured had it in their own power to make or cause to be made; as it was one of the precautions tending to secure the property against danger of fire and tending to its safety, — it was one which, as a general practice, the assured were bound to follow, although an occasional omission, owing to accident, or to the negligence of subordinate persons, servants, or workmen, not sanctioned nor permitted by the assured, or by their superintendent, manager, or agent, might not be a breach or non-compliance. The second question under this clause regarded the time at which the examination was to be made. The question, as understood at the trial, was this: Whether, if the factory work was continued during extra hours in the night, that is, after half-past eight P. M., the examination should be made at half an hour after the cessation of actual work, or half an hour after the time fixed in the twenty-first answer, as the usual hour of the cessation of work? On this

§ 255. **Limitation of Risk; Warming; Care of Stoves; Ashes; Shutters.**—In *Aurora Fire Insurance Company v. Eddy*,¹ one

question, considering the purpose of the examination, and considering that the object of the examiner would be, by the sense of sight or smell to detect any latent fire, or fire beginning to kindle, arising from sparks from the extinguished lamps, spontaneous combustion, friction of machinery, or otherwise; as this could be best accomplished after the mills were stopped, and the operations of the factory for the night had ceased, and the persons employed in it had left, I was of opinion that the examination must be made at thirty minutes after the cessation of the actual work of the factory, and that an examination at thirty minutes after the time fixed by the twenty-first answer, as the usual time for closing work, if the factory did continue in operation, was not a substantial compliance with this stipulation. And the court are of opinion that this direction, in the case supposed, was right, and that such is the correct construction of the contract. The answer had represented that the usual hour of the cessation of work was half-past eight, yet, having represented that the factory would sometimes be worked during extra hours in the night, they had a right so to work without impairing the contract. But if they thought fit, for any cause, to change the hour of work, so that it should continue to a later hour of the night, they must see that the examination be made at thirty minutes after the actual cessation of work. But another question is now presented, which was not distinctly raised at the trial, and in regard to which the evidence was not fully reported; and it is this: What is the cessation or termination of work? or, in other words, What is the meaning of thirty minutes after work, within the meaning of the answer to the fourteenth question? As there is to be a new trial on other grounds, we think it proper to state the opinion of the court upon this point; although, through misapprehension of the counsel, or of the court, or otherwise, it was not raised at the trial, or presented on the report. The question as to what is a termination of work, within the meaning of this contract, is partly a question of law and partly a question of fact. The intentions of the parties, if they can be ascertained, are to govern; and these are to be learned from the language used construed in connection with every part and clause in the contract, the subject-matter respecting which they are used, and the obvious purposes of each stipulation. That the assured were bound to make an examination at thirty minutes after work is the construction of law on the contract. What is the cessation of work is a question of fact for the jury, depending upon the circumstances, and having in view the object and purpose of the stipulation, which was to have an examination at such time as will conduce to the safety of the building. As some of the sources of danger are the continuance of fires and lights, and the friction of machinery, so long as the general work of the factory and operation of the machinery continue, a jury must find that the work had not then ceased, and could not be warranted in finding otherwise. If, on the contrary, the gates were shut, the machinery all stopped, the fires and lights extinguished, and the operatives generally retired, it could hardly be said that the work had not ceased, although one or two persons should remain to do something which should create no danger of fire. The fact to be looked to is not that the persons employed have all left, or that the lights are all extinguished, or that the machinery has wholly stopped, but the termination of the time during which the factory is worked; and this is an inference of

¹ 55 Ill. 213. See also *Schmidt v. Peoria Mar. & Fire Ins. Co.*, 41 Ill. 295.

of the questions in the application was, "How warmed, — are any stoves used?" to which the answer was, "No stoves used;" and it was held that this was a representation that stoves were not used at the time when the representation was made, and not a warranty that they should not be used at all. And a warranty that stoves and pipes are well secured, and shall be kept so, is not to be so strictly construed as to be considered violated by an accidental occurrence, as by the fact that the wife of the insured, a few days after the pipe had been partly removed in preparation for removing both stove and pipe during summer, as was usual, in a moment of forgetfulness carelessly kindled a fire in the stove.¹ And an answer, "None," to the question whether stoves were properly secured, referred to stoves for heating purposes, and not to a stove used on board a steamboat for refitting purposes.² And a warranty that ashes are kept in brick is complied with if they are kept in some other equally safe way.³ [When the insured stated that the ashes on the premises were put into brick vaults and the policy stated that the company would not be liable if they were left on wood, the policy was held avoided by putting the ashes in a wooden barrel in the woodhouse continuously for several

fact, which may be influenced more or less by all these considerations. Now between the full operation of the factory and the entire cessation of work, extremes may be supposed on either hand, respecting which there could be no doubt. There may be various intermediate stages in which it would be the duty of the jury to determine, upon the particular combination of circumstances, whether they constituted a cessation of working of the factory or not. If the general work of the factory has ceased, although a single machine may remain in operation for a special purpose, we think a jury should be instructed, that if such machine should cause no danger of fire, the examination should be made at thirty minutes after the cessation of the general work, and not after the stopping of the particular machine, and this the rather because the contract stipulates but for one examination after the cessation of the general work, which, being apparently most for the interest of both parties, may be presumed to be most conformable to their intentions. . And so in the various cases it will be for the jury to say, under the direction of the court, taking into view the purpose of the examination, and the nature of the work done, and the risk attending it, whether, within the meaning of this contract, the work of the factory, in the particular case, had terminated."

¹ Mickey v. Burlington Ins. Co., 35 Iowa, 174. And see *ante*, § 241.

² Lyon v. Stadacona Ins. Co., 44 U. C. (Q. B.) 472, 474. See also Madsden v. Phenix Ins. Co., 1 S. C. N. s. 24.

³ Underhill v. Agawam Mut. Ins. Co., 6 Cush. (Mass.) 440.

weeks up to the time of the fire, though done by a boy without orders, it appearing that there were no brick vaults as stated.¹] A statement in the description of the building insured that it has "iron doors and shutters," is no warranty that they shall be kept closed at any particular time.²

§ 256. **Description; Representation.** — Matter of description, unless by the terms of the policy made to have greater force, stands upon the footing of representations, and if facts material to the risk are omitted it is a concealment.³ (a) And mere matter of immaterial description, so immaterial as not presumbably to have been regarded by either party as of importance, contained in the application, will not by reference be converted into a warranty. This was the doctrine declared in a case where a detailed description was given as to the occupancy of the several rooms of a building on which insurance was obtained, which was not in all respects true, even at the time when the insurance was effected.⁴ And to the same effect is *Frisbie v. Fayette Mutual Insurance Company*,⁵ where, amongst other statements in the application, which was made part of the policy, it was said that a clerk slept in the store. But this was held to be mere description of the mode of occupancy at the

¹ [Worcester v. Worcester Mut. Fire Ins. Co., 9 Gray, 27, 29.]

² Scott v. Quebec Ins. Co., 1 Stuart (Lower Canada), 147.

³ Casey v. Goldsmid, 4 L. C. (Q. B.), 107, reversing s. c. 2 id. 200; Perry Ins. Co. v. Stewart, 19 Pa. St. 45; Baxendale v. Harvey, 4 H. & N. (Exch.) 445. A statement that a threshing machine is "stored in the barn" is mere matter of description. Material misdescription is such as is not substantially correct, and such as leads to a lower rate of premium than if the description had been correct. *In re Universal, &c. Ins. Co.*, L. R. 19 Eq. 485; s. c. 5 Benn. Fire Ins. Cas. 688; *Everett v. Continental Ins. Co.*, 21 Minn. 76.

⁴ Boardman v. N. H. Mut. Fire Ins. Co., 20 N. H. 551.

⁵ 27 Pa. St. 325.

(a) When there is no written application and the insured had correctly described the property to the agent, a misdescription in the policy will not defeat the contract, though the description was made part of the contract and a warranty. *Dowling v. Merchants' Ins. Co.*, 168 Penn. St. 234; *supra*, § 181, n. (a). Where the application stated

that a certain contract was secured by a conditional mortgage on the property, which was incorrect as describing the fact that the title itself was pledged, and the insurer knew the material facts, the policy was held not to be defeated by the erroneous description. *Davis v. Pioneer Furniture Co.*, 102 Wis. 394.

time, and not a warranty that the clerk should sleep there every night.

A call for a true description of the house, building, or place where the insured goods are kept, refers to the characteristics of the house, not the interest of the insured in it. And therefore a lodger in a room furnished by himself may well say that the property insured — his furniture — is in his dwelling-house.¹ And when the particular interest is the subject-matter of the insurance, a misdescription of the ownership or of the property to which the interest attaches, in the absence of express stipulation to that effect, will not avoid the policy.² The description of a dwelling-house in the application will not be held to be a warranty, unless the policy shows it was so intended.³

§ 257. **Description; Warranty; Place.** — It has been held in some cases, however, that mere matter of description may amount to a warranty. Thus it is said in *Fowler v. Ætna Fire Insurance Company*⁴ that mere description of the subject-matter of insurance, as, for instance, that a house is “filled in with brick,” is a warranty, after the analogy of marine insurance, as the estimate of the risk must generally depend upon the description. But the case cited in support of the opinion does not support it.⁵ The question in that case was one of the materiality of an alteration of the building insured. And the same was said in *Sillem v. Thornton*,⁶ where the house was described as a two-story house, when in fact it was at the time of insurance being converted into a three-story house, — a change which was commenced some months after the application was made.⁷ And this

¹ *Friedlander v. London Ass. Co.*, 1 M. & Rob. 171.

² *Fox v. Phoenix Fire Ins. Co.*, 52 Me. 333; *Longhurst v. Conway Fire Ins. Co.*, U. S. Dist. Ct. Iowa, 1861; *Dig. Ins. Cas.* 3d ed., by Bates.

³ *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. (N. Y.) 481, affirming s. c. 13 id. 92. But see *ante*, § 247, note.

⁴ 6 Cowen (N. Y.), 673; s. c. 7 Wend. (N. Y.) 270.

⁵ *Stetson v. Mass. Mut. Fire Ins. Co.*, 4 Mass. 330, 337. And see *post*, § 262.

⁶ 3 E. & B. 868.

⁷ See also, to the same effect, *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, where, however, the point decided was that there had been no change from a permitted to a prohibited use.

case states the doctrine with the limitation that only such descriptive matter as relates to the risk amounts to a warranty. Probably that is all that was intended in either case, as that was all that was required by the facts. In *Sillem v. Thornton*,¹ the policy was not issued till some months after the application was made, and there had been a change in the mean time in the status of the property, a two-story house having been converted into a three-story house; and the description of the house was held to be a warranty.² So it has been held that if the property is de-

¹ *Ubi supra*.

² In *Stokes v. Cox*, 1 H. & N. (Exch.) 533, the court seemed to regard this case as one not to be followed except upon identical facts. As *Sillem v. Thornton* goes to the extreme limits of strictness, and is ably stated, we give here liberal extracts from the opinion of Lord Campbell, C. J.: "But we are further of opinion that the description in the policy amounts to a warranty that the assured would not, during the time specified in the policy, voluntarily do anything to make the condition of the building vary from this description, so as thereby to increase the risk or liability of the underwriter. In this case, the description is evidently the basis of the contract, and is furnished to the underwriter to enable him to determine whether he will agree to take the risk at all, and if he does take it, what premium shall he demand. The assured, no doubt, wished him to understand that not only such was the condition of the premises when the policy was to be effected, but, as far as depended upon them, it should not be altered so as to increase the risk during the year for which he was to be liable if a loss should accrue. Without such an assurance and belief the statement introduced into the policy of the existing condition of the premises would be a mere delusion. Identity might continue, and yet the quality, condition, and incidents of the subject-matter insured might be so changed as to increase tenfold the chances of loss, which, upon a just calculation, might reasonably be expected to fall upon the underwriter. Can it be successfully contended that, having done so, the assured retain a right to the indemnity for which they had stipulated upon a totally different basis? With respect to marine policies, we conceive that if there be a warranty of neutrality, or of any other matter which continues of importance till the risk determines, whether the policy be for a voyage or for a certain time, such a warranty is continuous; and if it be broken by a default of the assured, the underwriter is discharged. The implied warranty of seaworthiness applies only to the commencement of the voyage: but even here, if the assured, during the voyage, were voluntarily to do any act whereby the ship was rendered unseaworthy, and thereby a loss were to accrue, we conceive that they would have no remedy on the policy. A distinction, however, is taken in this respect between a marine policy and insurances of houses against fire. It would probably be allowed that if during war there was a policy on a merchant ship described as carrying ten guns, and employed in the coal-trade, and after the policy was effected the owner should reduce the armament to five guns, or load her with oil of vitriol, the underwriter would not be liable for a subsequent loss. But it is strenuously asserted that if there be an insurance against fire upon a house, which is described in the

scribed as situated at a particular place, or in a particular building, this is a warranty as to the locality.¹ (a)

policy as being of a particular specified description, and in which it is stated that the occupier carries on a certain specified trade, — this being true at the date of the policy, the assured, preserving the identity of the house, may alter its construction, so as to render it more exposed to fire, and may carry on in it a different and more dangerous trade, without prejudice to the right to recover for a subsequent loss by fire, the warranty extending only to the state and use of the premises at the moment when the policy was signed. This seems quite contrary to the principles on which contracts are regulated. The construction and use of the premises insured, as described in the policy, constitute the basis of insurance, and determine the amount of the premium. But this calculation can only be made upon the supposition that the description in the policy shall remain substantially true while the risk is running, and that no alteration shall subsequently be made by the assured to enhance the liability of the insurer. It seems strange, then, that

¹ *Bryce v. Lorillard Ins. Co.*, 55 N. Y. 240. It would be perhaps more correct to hold that a policy on property situated in one place never attached to property situated at a different place, than to hold there was a breach of warranty. See *post*, § 400 *a*.

(a) Where, the property being described in the complaint as "lots 27 and 28, block 8, in Harlington addition to Mt. Tabor," it appeared that there was no such place, but that they were as numbered in Harlem addition to East Portland, the variance was held not fatal. *Baker v. State Ins. Co.*, 31 Oregon, 41. So, where the insured building was described as situated on lot 2, block 3, and there was evidence of an incumbrance on the west seventy-seven feet of the east ninety feet of block 2, and all buildings thereon, this was held not evidence of the incumbrance of the insured building. *Greenlee v. Iowa State Ins. Co.*, 102 Iowa, 260.

Where a dwelling-house or personal property is insured, and the policy by mistake misdescribes the land on which it is situated, this will not of itself affect the risk or render the policy void, and it is not necessary to reform the policy, in case of a loss, to recover thereon. *Kansas Farmers' F. Ins. Co. v. Saindon*, 52 Kansas, 486; *Omaha F. Ins. Co. v. Dufek*, 44 Neb. 241; *Martin v. Farmers' Ins. Co.*, 84 Iowa, 516.

But where a policy of insurance insured buildings situated on section 31, it was held, that, even if section 31 were inserted by mistake, the parties, intending the insurance to be on buildings upon section 32, no recovery can be had for a loss to buildings on the latter section without a reformation of the policy. *Collins v. St. Paul F. & M. Ins. Co.*, 44 Minn. 440.

Where, under a policy insuring tobacco and cigars "contained in brick block situated 82-90 Worthington St.," a firm occupied the fifth story over stores numbered 84 to 90 and also the fifth story over a store numbered 80, the only entrance to all being a doorway numbered 82; and the building had been, from time to time, extended and remodeled and was owned by one person, and a doorway and a hallway connected 80 with 82, it was held that the policy covered the contents of No. 80; and that where a policy describes the building by its official number, the unauthorized change to another number by the owner does not affect the policy. *Westfield Cigar Co. v. Ins. Co. of No. America*, 165 Mass. 541.

§ 258. **Limitation of Risk ; Description ; Surroundings ; Distance ; Contiguity.** — With regard to the situation of the property insured, its surroundings, its relation to other buildings, and its exposure to risk from external sources, if the insured warrant that he has made a full and true statement, on penalty of forfeiture, he must take the consequences of any real omission. If he will undertake to state all the buildings exposed within a given distance, the penalty of failure will be the loss of his right to recover.¹ We say *real* omission, because if the omission be of some insignificant out-house, it will be of no importance.² It is a question of

if a house be described in the policy as occupied by the owner, carrying on the trade of a butcher, so that the premium is on the lowest scale, he may immediately afterwards, merely taking care that the walls and floors and roof remain, so that it is still the same identical house, convert it into a manufactory for fireworks, a trade trebly hazardous, for which the highest scale of premium would be no more than a reasonable consideration for the stipulated indemnity. . . . Now, assuming the law to be that upon an insurance against fire there is an implied engagement that the assured will not afterwards alter the premises so that they shall not agree with the description of them in the policy, and so that thereby the risk and liability of the insurer shall be increased, we have only to consider whether, in this instance, the assured have not done so by converting the house insured from 'a house composed of two stories' into a house composed of three stories ; and this really admits of no reasonable doubt. Mr. Bramwell very candidly admitted that if the policy remained in force after the alteration, it covered the third story as well as the other two. This being so, the increase of the area of the building by a third story must be considered by the court to have necessarily increased the hazard or probability of fire about as much as if the addition to the house had been lateral instead of vertical.

"But there is another consideration, which is quite decisive to show that by the alteration the liability of the insurer is increased, and that his premium, if previously fair, has now become inadequate. Upon an insurance of a house against fire, the insurer must make good the whole of any partial loss, the owner not being considered to stand his own insurer for the excess of the value of the house beyond the sum for which the insurance is effected. The value of the additional property here sought to be covered by the insurance must be taken to be £1,000, and for the whole of this, or any part of it, the defendant is now liable to the full amount of the sum for which he has subscribed the policy till he has paid £1,600, *plus* his liability to this amount for the destruction of any part of the original house, valued at £4,000. We are of opinion that this additional liability could not be thrown upon him, without any consideration and against his consent, by the act of the assured in altering the house so as to make it no longer correspond with the description of the house in the policy. If the liability cannot be carried to this extent, it is entirely gone ; and, therefore, we pronounce judgment for the defendant."

¹ *Chaffee v. Cattaraugus County Mut. Fire Ins. Co.*, 18 N. Y. 376.

² *White v. Mut. Fire Ass. Co.*, 8 Gray (Mass.), 567.

the substantial truth of the warranty. The more guarded warranty, qualified by the limitation, "so far as is known to the assured," will throw upon the insurers the burden of proving the knowledge of the insured, without which proof their responsibility cannot be avoided.¹ So where the question calls for the relative situation of other buildings and the distance of the building insured from each other building within a given distance, it must be answered with substantial accuracy.² And the same is true whether the answer be in detail, or generally, as by saying "see diagram," or "see plan," the diagram or plan being annexed to the application, which is made part of the policy by its terms.³ If the diagram, however, be not annexed to the application, although referred to therein, it will not necessarily be regarded as a warranty; certainly not except as to such matters contained therein as are responsive to the particular interrogatories in the application.⁴ And it may be said generally with regard to such statements as are imported into the contract by reference, and thus made warranties, that, while the courts will not readily yield to the claim that a merely literal and technical breach will avoid the policy, they will be disposed to hold that a technical compliance will be sufficient to prevent a forfeiture. Thus, where, in answer to the question as to the relative situation of other buildings, it was said that there were two within fifty feet, this was held to be a literally truthful answer, and sufficient to prevent a forfeiture, although in point of fact

¹ *Hall v. People's Mut. Ins. Co.*, 6 Gray (Mass.), 185.

² *Frost v. Saratoga County Mut. Fire Ins. Co.*, 5 Denio (N. Y.), 154; *Susquehanna Ins. Co. v. Perrine*, 7 Watts & Serg. (Pa.) 348; *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio (N. Y.), 75; *Burritt v. Saratoga County Mut. Ins. Co.*, 5 Hill (N. Y.), 188; *Trench v. Chenango County Mut. Ins. Co.*, 7 id. 122; *Hardy v. Union Mut. Fire Ins. Co.*, 4 Allen (Mass.), 217. The decision in *Trench's* case, that the rule does not apply in cases of insurance on personal property, is substantially overruled in *Wilson v. Herkimer, &c. Ins. Co.*, 6 N. Y. 53. See also *Kennedy v. St. Lawrence, &c. Ins. Co.*, 10 Barb. (N. Y.) 285; *Associated, &c. Ins. Co. v. Assum*, 5 Md. 165. In the last case "premises" is held to apply to "goods." *Ante*, §§ 228, 243.

³ *Tebbetts v. Hamilton Mut. Ins. Co.*, 1 Allen (Mass.), 305; *Abbott v. Shawmut Mut. Fire Ins. Co.*, 3 Allen (Mass.), 213.

⁴ *Sayles v. North Western Ins. Co.*, 2 Curtis (U. S. C. Ct.), 610.

one of the buildings was within two feet of the insured premises.¹ A building fifty feet away from another is not "contiguous" to it.² [Nor one twenty-five feet away.³]

§ 259. **Surroundings; How Bounded; Situation.** — But a slight variation in the language of the application may make a very material difference. Thus, where the question, instead of calling for the relative distance from other buildings and distance from each, is, "How bounded? and the distance from other buildings if less than ten rods?" it has been held that a statement of the nearest contiguous buildings, without stating all within ten rods, was all that was required. To say the least, such a form of inquiry left it fairly open to the insured to infer that all he was called upon to mention was such buildings as were contiguous to, and bounded, the insured premises.⁴ The less specific inquiry, as to "the relative situation of other buildings," without any limitation as to distance, leaves the matter open to the judgment of the assured; and it would seem to be all that can reasonably be required that he, having regard to the object of the inquiry and to the circumstances of the case, should, in good faith, designate such buildings as he believes, or has reason to believe, will fairly answer this question.⁵ Upon this point a very interesting case was early tried before Shepley, C. J., in Maine, where the policy was to be void "if any circumstances material to the risk be suppressed," and where to the questions, "What are the buildings occupied for that stand within four rods? how many buildings are there to the fires of which this may be in any case exposed?" there was no answer; and to the further question, "What distances from other buildings?" the answer was, "East side of the block small one-story sheds,

¹ *Allen v. Charlestown Mut. Ins. Co.*, 5 Gray (Mass.), 384. See also *Sayles v. North Western Ins. Co.*, 2 Curtis (U. S. C. Ct.), 610.

² *Arkell v. Commerce Ins. Co.*, 69 N. Y. 191.

³ [*Olson v. St. Paul Fire & Mar. Ins. Co.*, 35 Minn. 432 (ambiguities go against the company).]

⁴ *Gates v. Madison County Mut. Ins. Co.*, 2 Comst. (N. Y.) 43; s. c. 1 Seld. (N. Y.) 469, reversing s. c. 3 Barb. (N. Y.) 73; *Masters v. Madison County Mut. Ins. Co.*, 11 id. 624.

⁵ *Hall v. People's Mut. Ins. Co.*, 6 Gray (Mass.), 185.

and would not endanger the building if they should burn." The fact was that the fire broke out in a building across the street, within less than fifty feet of the insured premises, extended to the sheds, through which it was communicated to the property of the insured. It was claimed that there was concealment in not stating the existence of the building in which the fire originated, and misrepresentation in stating that the sheds were such that if burned they would not be a source of danger. But the court ruled that if the answers were in good faith, and according to the best judgment of the insured, and if the opinion which he gave — the questions being such as to involve in the answer, to a considerable extent, matter of opinion — was honestly entertained, however erroneous they might be viewed in the light of subsequent events, he was entitled to recover. The plaintiff had a verdict, and, upon exceptions, the ruling was sustained.¹

§ 260. **Description.** — In the description of buildings on which insurance is sought care should be taken to give not only a description of the main building, but also of the subordinate structures attached, such as kitchens, sheds, storehouses, and the like, as these latter, save in exceptional cases, are part and parcel of the structure, and are therefore material.² Yet if the insurers have such a description of the premises as, though leaving the matter open and doubtful, puts them on inquiry, and they do not choose to make further inquiry, but accept the application as it is, and issue a policy thereon, they cannot afterwards set up misrepresentation in defence, although the description be inaccurate.³ So if the answer be imperfect upon its face, and does not convey, or pretend to convey, the information required by the question, the company issuing a policy upon

¹ We have given the opinion in another connection *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125; *ante*, § 211. See also *Casey v. Goldsmid*, 4 L. C. (Q. B.) 107; reversing s. c. 2 L. C. 200; s. c. 3 Bennett, Fire Ins. Cas. 675.

² *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52; *Day v. Conway Ins. Co.*, 52 Me. 60.

³ *Woods v. Atlantic Mut. Ins. Co.*, 50 Mo. 112.

such obviously imperfect answer will not be allowed to set up the imperfection in defence.¹

§ 261. **Description; Evidence.** — A technically untrue description may be shown to be true by proof of a usage, as by showing that a house filled in with brick in front and rear, and supported by brick buildings on the sides, is regarded among insurers as a house “filled in with brick.”² And so a builder may be permitted to testify that buildings, built, the first two stories of brick, and above that by being filled in with brick, would be regarded as “brick buildings.”³ It is a “brick building” within the meaning of the policy, if it is so termed in common parlance, even though it may have one wall which is partly or wholly constructed of wood.⁴ Indeed, a false description is in many policies only made a ground of defence when it has the effect to obtain insurance at a lower rate than if a true description had been given. And this would seem to be a sensible as well as practical standard; for if the insurers would have taken the risk at the same rate had they known the truth, they ought not to complain.⁵ If there is room to doubt, such matter of description will be regarded as inserted rather for the purpose of identification than as a warranty.⁶ (a)

¹ *Peoria Mar. & Fire Ins. Co. v. Perkins*, 16 Mich. 381.

² *Fowler v. Ætna Fire Ins. Co.*, 7 Wend. (N. Y.) 270.

³ *Mead v. Northwestern Ins. Co.*, 3 Seld. (N. Y.) 530.

⁴ *Gerhauser v. North Brit. & Mer. Ins. Co.*, 7 Nev. 174.

⁵ *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25; *Dobson v. Sotheby*, 1 Moo. & Malk. 90; *Moliere v. Pa. Fire Ins. Co.*, 5 Rawle (Pa.), 342.

⁶ *Gerhauser v. North Brit. & Mer. Ins. Co.*, 7 Nev. 174.

(a) Thus, a mistake in a proof of loss in regard to the number of the building does not affect the right of the assured to recover if the description of the building corresponds in other respects with that contained in the policy, and the insurer is not shown to have been misled or prejudiced by the error. *Faulkner v. Manchester Fire Ass. Co.*, 171 Mass. 349. If the owner of land, without any authority, substitutes another number for the official number of the entrance to the building

thereon, his act does not bind the tenant, in an action by him upon a fire policy on property contained in the building described by its changed number. *Westfield Cigar Co. v. Ins. Co. of North America*, 165 Mass. 541.

If the defence to an action upon a policy against loss by fire is that the property in a certain room was not covered by the words in the policy “contained in brick block,” the plaintiff, to show that his rooms were part of a single brick block, may show its

§ 262. **Description ; Estoppel.** — But knowledge of the company or its agents of the untruthfulness of the statements as to the distance of neighboring buildings, or of inaccuracy or incompleteness in the description of the property, at the time when the insurance is effected, by the general concurrence of the more recent decisions, will estop the insurers from setting up such untruthfulness in defence.¹

§ 263. **Description of Person.** — A statement of relationship in the description of the person whose life is insured is usually a matter of warranty, as where the applicant states that the person for whose benefit the insurance is made is his wife. If it be not expressly made a warranty, there can be no doubt of its materiality. The interest of a mistress in the preservation of the life might be much less than that of a wife. Whether therefore such a statement be a warranty or a misrepresentation it would be fatal to the policy.²

[§ 263 A. **Covenants to keep Books in Safe, keep Stock up, not to Question after Death ; Fall of Building, etc.** — A merchant's covenant to keep his books "in a safe at night," does not mean from sunset to sunrise, but from the time the business of the day is over, which may be 9 or 10 P.M. or later.³(a) The company's agent for adjustment may waive

¹ *Ante*, § 143 ; *post* 497 *et seq.* ; Clark §. Union Mut. Fire Ins. Co., 40 N. H. 333 ; Longhurst v. Conway Fire Ins. Co., U. S. Dist. Ct. Iowa, 1861 ; Clark's Dig. Fire Ins. Cas. (3d ed.) p. 96 ; Plumb v. Cattaraugus County Mut. Ins. Co., 18 N. Y. 392 ; James River Ins. Co. v. Merritt, 47 Ala. 387.

² Stanard v. Am. Pop. Life Ass. Co., Superior Ct., city of Buffalo, cited by Bliss, Ins. 164.

³ [Jones v. Southern Ins. Co., 38 Fed. Rep. 19, 21 (Ark.), 1889.]

construction, ownership, appearance, and use, and that it bore one name, and was commonly designated by that name. Westfield Cigar Co. v. Ins. Co. of North America, 169 Mass. 382 ; 165 Mass. 541. But, at the trial of an action on a policy, in which the property insured is described as a "three-story brick building occupied as pottery, situate in E., known as the Pottery building," the plaintiff cannot successfully contend that another building subsequently built on the end of the

Pottery building is covered by the policy, if there is nothing in the policy to indicate that any other structure was intended to be covered than the one building designated. Forbes v. American Ins. Co., 164 Mass. 402.

(a) Upon the iron-safe clause, see Parsons v. Knoxville F. Ins. Co., 132 Mo. 583 ; Brown v. Palatine Ins. Co., 89 Texas, 590 ; Liverpool, &c. Ins. Co. v. Sheffy, 71 Miss. 919 ; Western Ass. Co. McGlathery, 115 Ala. 213. This clause is not a warranty, and substantial

the condition of the policy as to keeping the books and invoices in a fireproof safe, by demanding duplicates of the burned invoices, and inducing the insured to incur trouble and expense in obtaining them.¹ A plea that the insured promised to keep up his stock to \$2,000, and that he failed

¹ [Brown v. State Ins. Co., 74 Iowa, 428.]

compliance only is required. *Liverpool, &c. Ins. Co. v. Kearney* (Ind. Ter.), 27 Ins. L. J. 873; *Murphy v. Royal Ins. Co. (La.)*, 29 id. 210. See *Goldman v. North British & Merc. Ins. Co.*, 48 La. An. 223; *Goddard v. East Texas F. Ins. Co.*, 67 Texas, 69. When requiring a fire-proof safe, it is not a warranty that the safe will preserve the books. *Knoxville F. Ins. Co. v. Hird* (Tex. Civ. App.), 23 Ins. L. J. 16.

The covenant by the insured in the policy to keep books and to keep them at night in a fire-proof safe, or other safe place, has been held not to affect the risk and to be without consideration, so that its violation does not work a forfeiture. *Phoenix Ins. Co. v. Angel* (Ky.), 26 Ins. L. J. 722; *Mechanics' & Traders' Ins. Co. v. Floyd* (Ky.), 23 id. 335; *Citizens' Ins. Co. v. Crist* (Ky.), 56 S. W. 658; *Kemendo v. Western Ass. Co. (Tex. Civ. App.)*, 57 S. W. 293. *Contra*, cases *supra*; *Lozano v. Palatine Ins. Co.*, 78 Fed. Rep. 278; *Niagara F. Ins. Co. v. Forehand*, 27 Ins. L. J. 73; 58 Ill. App. 161. Where the policy recited a single gross premium for indemnity of \$— “on the following described property”: a certain amount on building, another on stock, and another on fixtures, a violation of the iron-safe clause was held not to prevent recovery on the building and fixtures. *Hanover F. Ins. Co. v. Crawford* (120 Ala.), 28 Ins. L. J. 945. Where the clause is valid, the books are required to be kept so as to be intelligible and accurate. *Pelican Ins. Co. v. Wilkerson*, 53 Ark. 353. See *Home Ins. Co. v. Delta Bank*, 71 Miss. 608.

The clause is complied with, when during a fire, the books are removed un-

der a reasonable fear of the security of the safe, some being dropped and burned, if due care is used in the removal. *East Texas F. Ins. Co. v. Harris* (Tex. Civ. App.), 23 Ins. L. J. 552. See *Liverpool, &c. Ins. Co. v. Kearney*, *supra*. Where the insured store was kept open after dark for business, as was the custom; but the door was kept locked, and customers knocked for admission, and the bookkeeper having left for a few minutes, intending to return, the fire occurred during his absence, it was held that the store was open for business within the meaning of the policy clause, which required the books to be locked in an iron safe at night, and at all times when the store was not open for business. *Sun Ins. Co. v. Jones*, 54 Ark. 376. See *Southern Ins. Co. v. Parker*, 61 Ark. 207. The iron-safe clause may be waived. *Georgia Home Ins. Co. v. Allen* (119 Ala.), 28 Ins. L. J. 119.

An intentional failure to keep books of account showing correct purchases and sales, and to keep the books in some place secure from fire, is a proper plea, and establishes a defence when such failure is made a ground of forfeiture by the policy. A refusal to submit such books and invoices for examination after the loss, when required by the policy, is a bar to recovery, and it is not sufficient to say they were not kept. *Niagara Fire Ins. Co. v. Forehand*, 27 Ins. L. J. 73. See *American Central Ins. Co. v. Ware*, id. 785; *Rissler v. American Cent. Ins. Co.*, 28 id. 615; *Sun Mut. Ins. Co. v. Dudley*, id. 44; *Levine v. Lancashire Ins. Co.*, 26 id. 36; *Liverpool, &c. Ins. Co. v. Ellington*, id. 492.

to do so, is insufficient to defeat the plaintiff's suit. The failure to perform a stipulation cannot be transformed into a fraud in procuring the contract so as to avoid it. And as in this case it seems that the insured allowed his stock to fall far below the amount of the insurance, the company was benefited and its risk reduced by the breach of agreement.¹ A stipulation on the back of a policy that no question as to the validity of the application or certificate shall be raised after the death of the member binds the company, and evidence of fraud and misrepresentation in the application will be excluded.² A policy conditioned for forfeiture if the building falls, is not avoided by the fall of *part* of the structure.³ Otherwise if the condition specifies "the fall of the building or any part of it."⁴

[§ 263 B. **Substantial Compliance enough; Failure by Fault of Company; Ill-Worded Condition.**— When a policy prohibited the "keeping" of benzine in a store, but also gave permission to keep one barrel of benzine or turpentine in tin cans, and when it was brought to the store in a wooden barrel and there transferred to the tin cans, during one of which transfers an explosion and fire and loss occurred, it was held that there was a substantial compliance with the conditions, and therefore a recovery could be had.⁵ *Substantial* fulfilment of an agreement to keep buckets full of water in certain places is sufficient. Literal compliance is not enforced.⁶ Where the application states that no stove pipes pass through floors or roofs, but all enter brick chimneys, there is no obligation to refrain from so passing a pipe, if it is so secured as to be as safe as if it entered a brick chimney. The risk must not be substantially increased, that is all.⁷ A plaintiff is discharged where per-

¹ [Travis v. Peabody Ins. Co., 28 W. Va. 583, 597.]

² [Wright v. Mut. Benefit Ass., 43 Hun, 61.]

³ [Security Ins. Co. v. Mette, 27 Brad. 324.]

⁴ [Ill. Mut. Ins. Co. v. Mette, id. 330.]

⁵ [Maryland Fire Ins. Co. v. Whiteford, 31 Md. 219, 226. See § 218, substantial fulfilment sufficient.]

⁶ [Cady v. Imperial Ins. Co., 4 Cliff. 203, 211.]

⁷ [Bankhead v. Des Moines Ins. Co., 70 Ia. 387.]

formance of a condition is prevented by the defendant.¹ Failure of the insured to fulfil an agreement he made to insure all goods consigned to or shipped by him in the same company, will not avoid his policy, unless it is expressly so conditioned in the policy.² When the insurance was upon goods, and a condition in the policy made it void for "lighting the premises insured by camphene, &c.," the condition was held operative, although inapt in expression,³ the insurance being on *goods*, not *premises*.]

[§ 263 C. **Evidence; Burden of Proof.** — Expert evidence is not admissible to show that the erection of adjacent buildings increases the risk. No one can be deemed an expert as to a matter of common experience.⁴ Evidence of the customary method of drying will not be received in determining the question whether the substitution of a fire-dryer for a steam-dryer in a hominy mill was an increase of risk.⁵ When the charter of a company, which was made a part of the policy, provided that it should be void if any other buildings were "erected, alterations made, &c.," the burden of proving a breach of this was held to be on the company.⁶]

[§ 263 D. **Canada Statutes.** — In Canada the conditions of an insurance policy are prescribed by law, and although they may be varied by agreement of the parties, the courts are watchful to exclude unreasonable changes. An insurance company that has not complied with the law of Canada in regard to the printing of conditions, cannot set up *against* the insured either his own or the statutory conditions.⁷ Conditions in an Ontario policy varying the statutory conditions must be stated as variations, or the policy will be subject to the statute only.⁸ Where the statute prohibits more than twenty-five pounds of powder, and the applicant

¹ [Bowes v. Nat. Ins. Co., 20 N. B. R. 438.]

² [Ark. Ins. Co. v. Bostick, 27 Ark. 539.]

³ [Stettiner v. Granite Ins. Co., 5 Duer, 594, 596.]

⁴ [Franklin Fire Ins. Co. v. Gruver, 100 Pa. St. 266.]

⁵ [German-American Ins. Co. v. Steiger, 109 Ill. 254.]

⁶ [Ritter v. Sun Mut. Ins. Co., 40 Mo. 40, 41.]

⁷ [Citizens', &c. Ins. Co. v. Parsons, 4 Can. Supr. Ct. R. 215.]

⁸ [Hartney v. North British Fire Ins. Co., 13 Ont. R. 581, 583.]

said he did not keep more than ten pounds, whereupon the policy was drawn so as to prohibit more than ten pounds, and a fire occurred when the plaintiff had more than ten and less than twenty-five pounds, it was held that the statute did not prevent the company from stipulating for a less quantity of gunpowder, and the policy was void.^{1]}

§ 263 E. **Massachusetts Standard Policy.** (a) — “A company may write upon the margin or across the face of a policy, or write, or print in type not smaller than long primer, upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form; and all such slips, riders, and provisions must be signed by the officers or agent of the company so using them.

“The said standard form of policy shall be plainly printed, and no portion thereof shall be in type smaller than long primer, and shall be as follows, to wit:—

¹ [Parsons v. Queen's Ins. Co., 2 Ont. R. 45; Armour, J., dissenting on the ground that the condition being more onerous than the statute, was unjust and unreasonable.]

(a) The legislature of a State cannot by statute delegate to its insurance commissioner legislative power to prepare and adopt the standard form of policy of such State. *Anderson v. Manchester F. Ass. Co.*, 59 Minn. 182; *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63. In New York a general statement by an insurance agent to an applicant that he is “insured” amounts to a valid parol insurance according to the standard fire policy of that State. *Hicks v. British America Ass. Co.*, 162 N. Y. 284. The insurer's agent cannot waive the stipulations of a standard policy. See *Hicks v. British America Ass. Co.*, 162 N. Y. 284; *Moore v. Hanover F. Ins. Co.*, 141 N. Y. 219; *Bourgeois v. Northwestern Nat. Ins. Co.*, 86 Wis. 606; *supra*, § 100, n. (a). In Massachusetts an agent of an insurance company to whom the company has intrusted blank policies of the Massa-

chusetts standard form signed by the proper officers, with authority to countersign and issue such policies, and also to grant permits for vacancies and for repairs by attaching written or printed permits to policies and sending copies thereof to the company, has no authority to bind the company by an oral agreement to grant such a permit. *Hill v. Commercial Union Ass. Co.*, 164 Mass. 406. The insurer, after premiums have been long paid, will not be allowed to defend on the ground that its policy is not according to the standard form. *Armstrong v. Western Manufacturers' Mut. Ins. Co.*, 95 Mich. 137. And the requirement that policies are to be in the standard form does not prevent an oral agreement to insure during removal until the policy can be changed. *Goodhue v. Hartford F. Ins. Co.*, 175 Mass. 187.

“No.

§ _____

“ [Corporate name of the company or association : its principal place or places of business.]

“This company shall not be liable beyond the actual value of the insured property at the time any loss or damage happens.

“In consideration of _____ dollars to them paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged, do insure _____ against loss or damage by fire, to the amount of _____ dollars.

“ (Description of property insured.)

“Bills of exchange, notes, accounts, evidences and securities of property of every kind, books, wearing apparel, plate, money, jewels, medals, patterns, models, scientific cabinets and collections, paintings, sculpture, and curiosities are not included in said insured property, unless specially mentioned.

“ Said property is insured for the term of _____, beginning on the _____ day of _____, in the year eighteen hundred and _____, at noon, and continuing until the _____ day of _____, in the year eighteen hundred and _____, at noon, against all loss or damage by FIRE originating from any cause except invasion, foreign enemies, civil commotions, riots, or any military or usurped power whatever; the amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens, but not to include loss or damage caused by explosions of any kind unless fire ensues, and then to include that caused by fire only.

“This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured, — or if the insured now has or shall hereafter make any other insurance on the said property without the assent in writing or in print of the company, — or if, without such assent, the said property shall be removed, except that, if such removal shall be necessary for the preservation of the property from fire, this policy shall be valid without such assent for five days thereafter, — or if, without such assent, the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risks, or if, without such assent, the said property shall be sold, or this policy assigned, or if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain

vacant for more than thirty days without such assent, or if it be a manufacturing establishment running in whole or part extra time, except that such establishments may run in whole or in part extra hours not later than nine o'clock P. M., or if such establishments shall cease operation for more than thirty days without permission in writing indorsed hereon, or if the insured shall make any attempt to defraud the company, either before or after the loss, — or if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law, — or if camphene, benzine, naphtha, or other chemical oils or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal-oil may be used for lighting.

“If the insured property shall be exposed to loss or damage by fire, the insured shall make all reasonable exertions to save and protect the same.

“In case of any loss or damage under this policy, a STATEMENT in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and manner in which the fire originated, so far as known to the insured. The company may also examine the books of account and vouchers of the insured, and make extracts from the same.

“In case of any loss or damage, the company, within sixty days after the insured shall have submitted a statement, as provided in the preceding clause, shall either pay the amount for which it shall be liable, or replace the property with other of the same kind and goodness, — or it may, within fifteen days after such statement is submitted, notify the insured of its intention to rebuild or repair the premises, or any portion thereof separately insured by this policy, and shall thereupon enter upon said premises and proceed to rebuild or repair the same with reasonable expedition. It is moreover understood that there can be no abandonment of the property insured to the company, and that the company shall not in any case be liable for more than the sum insured, with interest thereon from the time when the loss shall become payable, as above provided.

"If there shall be any OTHER INSURANCE on the property insured, whether prior or subsequent, the insured shall recover on this policy no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon. And whenever the company shall pay any loss, the insured shall assign to it, to the extent of the amount so paid, all rights to recover satisfaction for the loss or damage from any person, town, or other corporation, excepting other insurers; or the insured, if requested, shall prosecute therefor at the charge and for the account of the company.

"If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate (a) *provided*, that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risks not paid for by the insured; and whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured.

"This policy may be CANCELLED at any time at the request of the insured, who shall thereupon be entitled to a return of the portion of the above premium remaining, after deducting the customary monthly short rates for the time this policy shall have been in force. The company also reserves the right, after giving written notice to the insured, and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice, and no mortgagee shall then have the right to recover as to such risks.

"In case any difference of opinion shall arise as to the amount of loss under this policy, it is mutually agreed that the said loss

(a) Under this clause, a fire policy continues in force for the mortgagee's benefit, so far as his interest appears, although the insured estate is conveyed by the mortgagor without the insurer's consent. *Palmer Sav. Bank v. Ins. Co. of North America*, 166 Mass. 189.

CHAPTER XII.

ALIENATION.¹

ANALYSIS.

1.

- Change of title by sale, gift, marriage settlement, devise, any way but by descent, § 266,
- is an alienation, and avoids the policy unless the insurers consent to it expressly, or by implication from usage and the nature of the case, as with a stock of goods ; see §§ 265, 278.
- absolute alienation suspends policy, and destroys it if title is out of the insured at time of loss, whether there is an express stipulation to that effect or not, § 264.
- a provision that the policy shall be " void " for alienation means voidable, § 264.
- even descent is fatal if the policy is to be void for change of title " by operation of law," § 266.
- If the alienation is only executory, or is without authority, or in any way incomplete or a failure, the policy is not affected, § 267 ; see §§ 268-269 a.
- So long as a scintilla of interest remains in the assured the policy is good, § 268.
- unless the legal estate is retained on purpose to defeat the conditions, § 267.
- unconditional delivery of personal property is an alienation, § 268.
- The object of provision against transfer is to prevent diminution of the interest which tends to prevent the insured from carelessness or fraud. Any change that substantially increases the motive to burn the property is a violation of the provision, § 273.
- a change that increases the assured's motive for vigilance does not avoid the policy though contrary to its letter, § 275.
- An alienation by a mortgagor after assignment of the policy with consent of the insurers is the act of a stranger and does not avoid the contract, § 276.

2. MORTGAGE AND FORECLOSURE.

- A mortgage before complete and valid foreclosure, whether on real (§ 269), or personal (§ 270) estate, is not an alienation, §§ 269, n., 269 a end, and 276 C. *Contra*, Indiana and Michigan, § 269.
- mere entry or commencement of foreclosure proceeding not fatal, §§ 276 C, 269 a.
- unless expressly so agreed, §§ 269 a, 276 C.
- and even then knowledge of the agent may estop the company, § 282 B.

¹ See Appendix to this chapter.

and entry of foreclosure between the application and the issues of the policy may not be covered by its terms, § 276 C.
foreclosure sale under valid mortgage is an alienation, § 273.

not so under an *invalid* mortgage, § 269 a.

if the period of redemption expires, consent of the mortgagee *next day* to extend it cannot save the policy, § 276 C.

fire before foreclosure sale, though on same day, company liable, § 276 C.

pending foreclosure, insurance in favor of mortgagee and assigns, company bound, § 276 C.

foreclosure sale without deed or report of sale, not a transfer, § 276 C.

"judgment in foreclosure" to avoid must be one that of itself effects a transfer, § 276 C.

Mortgage held an "alteration of ownership" and an "alienation in part," § 271.

Conditional sale no alienation, nor, in equity, is an absolute sale if intended only as security for debt; but at law parol will not be admitted to show that a deed absolute on its face is really only a mortgage, § 272; and see § 264.

and it is not necessary to have a defeasance *dchors* the deed recorded, § 272.

unless it is required by statute, § 272.

conveyance and reconveyance on trust for assured, not an alienation, neither is a lease, § 272.

Transfer from husband to wife through B. not fatal, § 273; *contra*, § 273.
Partners. Sale or mortgage or other transactions between partners or joint owners not an alienation, according to the best view, §§ 279-281; *contra*, § 280.

no new interest or element of carelessness is introduced, § 279.

but when this is done, as by taking in a new partner, the policy is avoided. A renewal after the change is good, however, although the company did not know of it, § 279.

in such cases there is apt to be trouble about the proper parties to the action, and it is best on change of partnership property to assign the policy with assent of the insurers, § 281.

transfer between co-tenants not fatal, § 280; *contra*, § 280.

levy of execution, § 274.

alienation must be by the one having the insured interest, §§ 267, end, and 276.

transfer of one of several distinct parcels, § 278.

"change of possession."

change of tenants not, § 273 A.

nor possession under a revocable license, § 273 A.

refers to "right of possession," § 273 A.

a contract to sell, though with delivery and part payment, no alienation, §§ 267, n., 276 B, and *contra*, § 267, n.

Sale, see next two heads.

Fatal Cases:

transfer in bankruptcy on insolvency, §§ 264, 276 A.

sale on credit, § 276 A.

sale and mortgage back, though vendor keeps possession, § 276 A.

deed absolute and return deed giving life-right of occupancy to vendor, § 276 A.

sale to mortgagee, § 276 A.

Cases not fatal:

trust-deed, § 276 B, or deed with trust back, § 272.

a lease, §§ 272, 276 B.

selling off a stock of goods, §§ 265, 278.

sale by trustee to himself or for his benefit, § 276 B.

sale *after cause of loss* though before actual loss, § 276 B.

sale of part interest, § 276 B.

sale of land under insured buildings, § 276 B.

ultra vires sale by school committee, § 276 B.

sham sale to cheat creditors, § 276 B.

foreclosure; see § 276 C, and above under "Mortgage."

Entire Contract. Where the premium is entire, alienation or other breach of condition in respect to a part of the property vitiates the contract as to all, § 277.

other cases hold however that a misrepresentation, sale, or other breach of condition affecting only a part of the property merely avoids the policy *pro tanto*, § 278.

true test, see § 277, first note.

if each has its specific premium the policy really includes several contracts, and the avoidance of one may not affect the others, § 277.

and the same rule should apply where the premium is apportionable on a clear and just principle, § 277, n.

if the assured has acted in good faith he should not lose his whole insurance by a breach as to part, unless such is the clear intent of the agreement, or a just division of the contract is impossible.

Waiver, §§ 282-282 B.

assent to conveyance cures all preceding (§ 282), but not subsequent transfers, § 282 A.

in general, assent of agent sufficient, § 282 A.

not if policy requires indorsement, § 282 A; *contra*, § 282 A.

payment of dividend to partner after transfer to him is a, § 282 A.

consent to corresponding assignment of policy is a, § 282 A.

but indorsement "payable to" not, § 282 A.

unless with knowledge of the facts, § 282 A.

levy waived, § 282 A.

and sale of land under house, § 282 A.

knowledge of the agent and his omission of proper endorsement estops company in case of ignorant applicant, § 282 B.

parol evidence that policy was to be drawn to cover intended transfer not admissible; suit should be for reformation, § 282 B, New York.

§ 264. **Limitation of Risk; Alienation.** — It follows from the general principle that the insured cannot recover save in exceptional cases for a loss, unless it appear that he had an interest in the subject-matter of insurance, as well at the time of the loss as at the time when the insurance was effected, that if he parts with his interest subsequent to the

insurance, and at the time of the loss has no longer an insurable interest, he will have no claim upon the company. This parting with his interest is termed in the law of insurance an *alienation*. The term is derived from the law of real property, and is there defined to be "any method of acquiring title wherein estates are voluntarily resigned by one man and accepted by another, whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property by the mutual consent of the parties." It is title by purchase in contradistinction to title by descent.¹ And this alienation, if absolute, works a forfeiture whether so stipulated in the policy or not, if the property remains out of the insured at the time of the loss.² So does a donation *inter vivos*, without restriction except that the donor shall not alienate, or dispose of, except by will.³ And an absolute deed, whether warranty or quitclaim, with a mortgage back, or an unsealed agreement to reconvey on the payment of a stipulated sum,⁴ is an alienation.⁵ So is a conveyance by a husband to a trustee for his wife, though the trust be immediately executed.⁶ (a) So an absolute conveyance by a mortgagor of his equity to the mortgagee, taking but not recording a bond for reconveyance on payment of a certain sum, is, in Massachusetts, an alienation, the statute of that State providing that an absolute conveyance shall not be defeated by an unrecorded defeasance.⁷ So is a transfer to

¹ 2 Blackstone, Comm. 287; *Burbank v. Rockingham Mut. Fire Ins. Co.*, 4 Fost. (N. H.) 550.

² *Wilson v. Hill*, 3 Met. (Mass.) 66; *Ætna Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385.

³ *Macarty v. Com. Ins. Co.*, 17 La. 365.

⁴ *Adams v. Rockingham Mut. Fire Ins. Co.*, 29 Me. 292.

⁵ *Ibid.*; *Home Mut. Fire Ins. Co. v. Hauslein*, 60 Ill. 521; *Abbott v. Hampden Ins. Co.*, 30 Me. 414. See also *post*, § 269.

⁶ *Oakes v. Manufacturing Ins. Co.*, Mass., April, 1881.

⁷ *Foote v. Hartford Fire Ins. Co.*, 119 Mass. 259.

(a) Where, as in Nebraska, the statute of uses is not in force, a conveyance by a husband to a third person, who conveys the property to his wife under agreement that she will hold it for his

use and benefit, and subject to his control, cannot be treated as an executed use, making the husband still the owner. *Farmers' & M. Ins. Co. v. Jensen* (Neb.), 78 N. W. 1054; 76 id. 577.

the assignee, by decree of the court, of a bankrupt's estate, under the bankrupt laws of the United States, upon the bankrupt's petition. He is thereby divested of all his property, and it becomes vested in the assignee. That the proceedings may be stayed, and thus the property become revested in him, is a contingency too remote to be considered the foundation of a remaining insurable interest in the bankrupt. He has no power to reclaim the property, and has no right to it in law or equity by any contract executed or executory. One may be interested in the avails of property alienated, and yet have no right to the property itself.¹ And of course a voluntary assignment for the benefit of creditors is equally a transfer,² unless possession be retained by the assignor.³ Even an assignment, fraudulent and void as against creditors, by virtue of the insolvent laws, has been held an alienation. As the case stood before the court the assignment was as if it were valid, since the court held the assignor estopped from setting up his own fraud for the purpose of getting back to his original title.⁴ And so, perhaps, is a sale by a master in chancery of a mortgagor's interest under a decree of foreclosure, with part payment of the purchase-money and execution by the vendee of the articles of sale, although the decree is not enrolled, and no deed is de-

¹ *Young v. Eagle Fire Ins. Co.*, 14 Gray (Mass.), 150; *Adams v. Rockingham Mut. Fire Ins. Co.*, 29 Me. (16 Shep.) 292; *Perry v. Lorillard Ins. Co.*, 6 Laus. (N. Y.) 201. Where the policy was upon personal property, and payable to the mortgagee in case of loss, and the mortgage amounted to more than the value of the property, it was held that an assignment in bankruptcy did not work a change in the title. *Appleton Iron Co. v. Brit. Am. Ass. Co.*, 46 Wis. 23. The case is distinguished from those cases where the insurance is upon real estate, as a mortgage of personal property conveys the title to the mortgagor, while one on real estate does not. In *Starkweather v. Cleveland Ins. Co.*, C. Ct., 19 Am. Law Reg. 333, 2 Abb. U. S. 67, 5 Bennett's Fire Ins. Cas. 328, it was held that an assignment in bankruptcy in pursuance of involuntary proceedings was no violation of a provision against a change or transfer of title.

² *Dey v. Poughkeepsie Mut. Ins. Co.*, 23 Barb. (N. Y.) 623; *Hazard v. Franklin Mut. Fire Ins. Co.*, 7 R. I. 429; *McQueen v. Phoenix Ins. Co.*, U. C. (Ct. of App.) 15 Can. L. J. 190, overruling s. c. in Q. B.; *Little v. Eureka Ins. Co.*, Cin. Sup. Ct., 5 Ins. L. J. 154.

³ *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9.

⁴ *Dadmun Manufacturing Co. v. Worcester Mut. Fire Ins. Co.*, 11 Met. (Mass.) 429; *Birdsey v. City Fire Ins. Co.*, 26 Conn. 165; *post*, § 273.

livered. The deed, when delivered, relates to the time of the sale.¹ We say "perhaps," because the rule is admitted to be different in England, and the decision seems to rest upon the practice in New York. The weight of authority undoubtedly is, that the "transfer and change of title," to use the language of the policy in this case, does not take place till the deed is delivered, or there is a confirmation by the court of the proceedings had under its order.² [The clause declaring that if the property "is alienated, the policy shall be void," is construed to mean that alienation makes the policy voidable at the election of the company.³]

§ 265. **Temporary Alienation; Parol Lease; Sale of Part of Property insured.** — Where, however, a policy prohibiting alienation, on penalty of avoiding the policy, was issued upon a store and stock of goods, the oral lease of the store and a sale of the stock of goods to the lessee, who before the expiration of the policy retransfers both the store and the remaining goods to the insured, have been held not to be a violation of the prohibition. Nor would a sale from time to time of a retail stock of goods, though during the currency of the policy the whole stock might be changed, be a violation of such a condition.⁴

§ 266. **Change of Title by Descent does not Avoid the Policy unless so expressed.** — A transfer of title by descent is therefore, according to the definition given,⁵ no alienation. By the death of the ancestor the property descends to the heir, it is true; but his title is not by what is technically understood to be a conveyance, purchase, or alienation.⁶ [But if

¹ McLaren v. Hartford Fire Ins. Co., 1 Seld. (N. Y.) 151.

² Farmers' Mut. Ins. Co. v. Graybill, 74 Pa. St. 17; Manhattan Ins. Co. v. Stein, 5 Bush (Ky.), 652.

³ [Grant v. Eliot, &c. Mut. Fire Ins. Co., 75 Me. 196.]

⁴ Lane v. Maine Mut. Fire Ins. Co., 3 Fairf. (Me.) 44; Power v. Ocean Ins. Co., 19 La. 28; West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289; *ante*, § 101; *post*, § 268.

⁵ *Ante*, § 264. See also Georgia Home Ins. Co. v. Kinnier, 28 Grat. (Va.) 88. [The death of the insured by which his property descends to *heirs* or *devisees* is not an alienation. Grant v. Eliot, &c. Mut. Fire Ins. Co., 75 Me. 196, 201.]

⁶ Burbank v. Rockingham Mut. Fire Ins. Co., 4 Fost. (N. H.) 550. The lien of the company (a mutual one) does not bind the heirs. Indiana Mut. Ins. Co. v. Chamberlain, 35 Blackf. (Ind.) 150; and a descent into the possession of the

a policy is to be void by any transfer, whether voluntary or by operation of law, the death of the insured avoids it unless the consent of the company to the descent of the property is obtained.^{1]}

§ 267. **If Title not conveyed, no Alienation; Executory Agreement.**—In discussing its meaning as bearing upon the subject of insurance, it has been said to import a conveyance of the title, and that nothing short of this would amount to an alienation.² (a) [In general a condition restraining the right of selling or assigning leasehold property is not broken by any act of the lessee, which falls short of divesting his legal estate, but if the legal estate is continued in him on purpose to evade the condition, the rule is otherwise.^{3]} "Transfer of the title in the property insured," means the title and ownership of the property insured, and not the interest of the insured therein.⁴ And whether applied to real or personal estate, it is a disposition by the owner of the property, by which he parts with all his interest, and it passes to another. An agreement, therefore, to sell though

heirs vitiates the policy under a condition that it shall be void if the property comes into the possession of any other than the insured. *Lappin v. Charter Oak Ins. Co.*, 58 Barb. (N. Y.) 325. Under a charter which gives a lien for premiums and other dues during the continuance of the policy, and provides that the policy shall be avoided by alienation, the lien is not good as against the alienee. *McCulloch v. Indiana Mut. Fire Ins. Co.*, 8 Blackf. (Ind.) 50. It might be otherwise if the statute did not make the policy void. *Russ v. Mutual Ins. Co.*, 29 U. C. (Q. B.) 73.

¹ [*Hine v. Homestead Fire Ins. Co.*, 29 Hun, 84, 93 N. Y. 75; *Sherwood v. Agricultural Ins. Co.*, 73 N. Y. 447, 451.]

² *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y. S. C.) 624.

³ [*Livingston v. Stickles*, 7 Hill, 253.]

⁴ *Springfield Fire & Mar. Ins. Co. v. Allen*, 43 N. Y. 389; *post*, § 273.

(a) *Forward v. Continental Ins. Co.*, 142 N. Y. 382; *McCoy v. Iowa State Ins. Co.*, 107 Iowa, 80; *Ehrsam Machine Co. v. Phenix Ins. Co.*, 43 Neb. 554. The value of the consideration is immaterial. *Brown v. Cotton & W. M. Ins. Co.*, 156 Mass. 587. A change of title by death of the insured does not work a forfeiture, the insurer not objecting that a formal change is not made. *Virginia F. & M. Ins. Co. v. Thomas*, 90 Va. 658; *Pfister v. Gerwig*, 122 Ind. 567. The clause against alienation does not apply to a deed invalid because of the grantor's insanity. *Gerling v. Agricultural Ins. Co.*, 39 W. Va. 689. A provision forbidding transfer of the title applies to the interest acquired by a new co-partner of the insured. *Germania F. Ins. Co. v. Home Ins. Co.*, 144 N. Y. 195.

in writing and with delivery of possession, and a receipt of part of the purchase-money in payment, is no alienation, so long as the title has not passed, and the property remains at the risk of the vendor, though the agreement be executed after the loss.¹ It can hardly be necessary to observe that an unauthorized alienation, as a mortgage by a husband of his wife's property, is in point of law no alienation as against the wife.² The alienation, unless otherwise stipulated, must be by the one having the insured interest.³

§ 268. **Alienation; Personal Property; Delivery.** — In cases of personal property, as the title passes by delivery, unless there is an agreement to the contrary, it is probable that an unconditional delivery would be held to amount to an alienation, and not otherwise.⁴ *Worthington v. Bearse*⁵ — a case of marine insurance — shows that an agreement for a transfer, so long as it is not completely executed, and so long as a scintilla of interest remains in the insured, will not be

¹ *Boston & Salem Ice Co. v. Royal Ins. Co.*, 12 Allen (Mass.), 381; *Davis v. Quincy Mut. Fire Ins. Co.*, 10 id. 113; *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y.) 624; *Norcross v. Franklin Ins. Co.*, 17 Pa. St. 429; *Trumbull v. Portage Mut. Fire Ins. Co.*, 12 Ohio, 305; *Hill v. Cumberland Valley Mut. Prot. Co.*, 9 P. F. Smith (Pa.) 474; *Gilbert v. North Am. Fire Ins. Co.*, 23 Wend. (N. Y.) 43; *Perry Ins. Co. v. Stewart*, 19 Pa. St. 45; *Shotwell v. Jefferson Ins. Co.*, 5 Bosw. (N. Y. Superior Ct.) 247; *Fire & Mar. Ins. Co. v. Morrison*, 11 Leigh (Va.), 354; *Washington Ins. Co. v. Kelly*, 32 Md. 421. [A contract by the insured to convey at a future day is not a breach of the condition against sale. *Kempton v. State Ins. Co.*, 62 Iowa, 83. It has been held however that a contract under seal to sell the insured premises, and part payment of the purchase-money avoids a policy. *Germond v. Home Ins. Co.*, 5 T. & C. (N. Y.) 120, 121. And in an Iowa case the assured agreed to sell to L. on instalments, the deed to be made when the money was all paid, and failure of any payment to avoid the whole contract. L. took possession under the contract, and this was held a sale which forfeited the policy. *Davidson v. Hawkeye Ins. Co.*, 71 Iowa, 532, Reed, J., dissenting. The dissent, it seems to us, has far greater weight in this case than the majority opinion. The contract with L. was not a sale, but an executory contract for a sale. The title did not pass. L. was not entitled to a conveyance of the property until he performed the conditions of the agreement.]

² *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53.

³ *McEwan v. Western Ins. Co.*, 1 Mich. (N. P.) 118.

⁴ *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9; *Norcross v. Insurance Co.*, 17 Pa. St. 429; *Boston & Salem Ice Co. v. Royal Ins. Co.*, 12 Allen (Mass.), 381; *Tallman v. Atlantic Ins. Co.*, 3 Keyes (40 N. Y.), 87.

⁵ 12 Allen (Mass.), 382.

treated as an alienation. The facts of the case were as follows: The action was on a policy of insurance for two thousand dollars, payable to the plaintiff in case of loss, issued by the defendants to David P. Nickerson, upon seven-eighths of the schooner "William B. Castle," for one year from April 8, 1860. Nickerson had mortgaged his interest in the schooner to the plaintiff; and afterwards, on the 11th of October, 1860, conveyed thirteen-sixteenths of the schooner to George T. Lovell, receiving notes of Lovell, Atwood, & Co. in payment, and Nickerson was to pay to the plaintiff what was then due to him, namely, about four thousand dollars. About the 20th of the same month, Lovell reconveyed said interest to Nickerson, and took back the notes which had been given in payment therefor, none of them having become due. This interest was reconveyed to Nickerson, because he could not carry out his contract to obtain a release from the plaintiff, as the latter would not accept said notes in payment thereof; and on the part of Lovell, because a person who was to be her master was dissatisfied with her; so that the parties acted from different motives, and each party was ignorant of the motives of the other. Upon both of these transfers, the papers were changed in the customhouse. The schooner was totally lost on or about the 16th of March, 1861. Nickerson then owned seven-eighths of her, subject to the mortgage of Worthington. Liability was held to attach for the full amount insured.¹

¹ Bigelow, C. J., here said: "We entertain no doubt that the defendants are liable for the full amount insured by the policy. This liability rests upon two grounds, either of which is sufficient to sustain the plaintiff's claim. In the first place, on the facts stated, the alleged sale by the assured of thirteen-sixteenths of the vessel covered by the policy was incomplete, and never took effect so as to extinguish his insurable interest therein. One of the essential stipulations of the agreement of sale was not complied with. The vendor expressly agreed to pay the amount due on the mortgage of his share of the vessel, and to procure a release from the mortgagee. This, the case finds, he did not and could not do. Until this part of the contract was complied with, the vendee had a right to avoid the sale and rescind the whole bargain. The delivery of the bill of sale passed a title only at the election of the vendee. He might, within a reasonable time after the failure of the assured to fulfil his contract of sale by procuring a release of the mortgage on the vessel, elect to restore the legal title and recover back the consideration of the transfer. During this time the plaintiff had a continuing and subsisting interest in the vessel. The transfer could not be regarded

§ 269. **Mortgage, before Foreclosure, no Alienation or Change of Title; Entry for Foreclosure · Merger of Title.** — The charter of a mutual insurance company provided that “when any property insured in the company shall in any way be alienated the policy thereupon shall be void;” and a by-law provided that “when the title of any property insured shall be changed by sale, mortgage, or otherwise, the policy shall thereupon be void;” and it was held that a mere mortgage did not avoid the policy. A mortgage is not an alienation, nor is it, without foreclosure, a change of title.¹(a) The

as absolute and complete, but only conditional on a compliance with the terms of the bargain. A mere transfer of the legal title of a vessel does not extinguish a right to recover on a policy, if the party making the transfer still retains any right or interest in the vessel or her proceeds. (*Gordon v. Mass. Ins. Co.*, 2 Pick. 249; *Lazarus v. Commonwealth Ins. Co.*, 19 Pick. 81; *Wilson v. Hill*, 3 Met. 66, 71.) The insured clearly had an interest in the preservation of the vessel, until it was certain that the contract for her sale had become complete, and the title to her had vested absolutely in the vendee. In this view of the facts, the insured did not forego his right to recover on the policy pending the transactions in relation to the transfer of the vessel. The other ground of decision is stated *ante*, § 101.”

¹ *Shepherd v. Union Mut. Fire Ins. Co.*, 38 N. H. 232; *Folsom v. Belknap County Mut. Fire Ins. Co.*, 10 Fost. (N. H.) 231; *Howard Ins. Co. v. Bruner*, 23 Pa. St. (11 Harris) 50; *Jackson v. Massachusetts Mut. Fire Ins. Co.*, 23 Pick. (Mass.) 418; *Conover v. Mut. Ins. Co. of Albany*, 3 Denio (N. Y.), 254; s. c. 1 Comst. (N. Y.) 290; *Pollard v. Somerset Mut. Fire Ins. Co.*, 42 Me. 221; *Smith v. Monmouth Mut. Fire Ins. Co.*, 50 Me. 96; *Dutton v. New England Mut. Fire Ins. Co.*, 9 Fost. (N. H.) 153; *Rollins v. Columbian Mut. Fire Ins. Co.*, 5 id. 200; *Rice et al. v. Tower & Trs.*, 1 Gray, 426; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213; *Com. Ins. Co. v. Spankneble*, 52 Ill. 53; *Hartford Fire Ins. Co. v. Walsh*, 54 id. 164; *Kelley v. Liverpool, &c. Ins. Co.*, 1 Hannay (N. B.), 266; *Sands v. Standard Ins. Co.*, U. C. (Ch.), 15 Can. L. J. 49; *post*, § 272. [*Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606; *Friezen v. Allemania Fire Ins. Co.*, 30 Fed. Rep. 352, Wis. 1887. A mortgage of property insured, without giving up possession, is not a breach of the condition that the “entire unconditional and sole ownership” must be in the assured, or of the conditions against selling, transferring, or change of title or possession. *Judge v. Conn. Fire Ins. Co.*, 132 Mass. 521.]

(a) See *Peck v. Girard F. & M. Ins. Co.*, 16 Utah, 121; *Williamson v. Orient Ins. Co.*, 100 Ga. 791; *Lancashire Ins. Co. v. Boardman*, 58 Kansas, 339; *Vaukirk v. Citizens' Ins. Co.*, 79 Wis. 627; *Tarbell v. Vermont Mut. F. Ins. Co.*, 63 Vt. 53; *Holloway v. Dwelling-House Ins. Co.*, 48 Mo. App. 1; *O'Brien v. Home Ins. Co.*, 79 Wis. 399; *East Texas F. Ins. Co. v. Clarke*, 79 Texas, 23; *National Bank v. Union Ins. Co.*, 88 Cal. 497; *Koshland v. Hartford Ins. Co.*, 31 Oregon, 402. A deed absolute on its face, but intended only as security, though really a mortgage, does not prevent the vendee being held the “sole

contrary doctrine has, however, been held in Indiana, though with some hesitation.¹ And in Michigan² it has been held that a conveyance absolute in form, but in fact merely as security for a debt, though not a sale, is a transfer or change of title which avoids a policy. "The words," say the court, "*transfer or change of title*, are more comprehensive than the word *sale*, which immediately precedes them. A sale is a parting with one's interest in a thing for a valuable consideration. This is what is generally understood by the word, and in every sale there is a transfer or change of title from the vendor to the vendee. But there may be a transfer or change of title without a sale. Should A. convey a piece of property to B. to hold in secret trust for him, there would be a transfer or change of title from A. to B., but there would not be a sale of the property, or an actual parting with it to B. for a valuable consideration, although the conveyance on its face would import a sale from A. to B. And if the trust, instead of being secret, appeared on the face of the conveyance, there would still be a change of title. The title would no longer be in A., but in B., his grantee. We think such a conveyance would clearly come within the condition of the policy and put an end to the insurance."³ (a)

¹ McCulloch v. Indiana Mut. Fire Ins. Co., 8 Blackf. 50; Indiana Mut. Fire Ins. Co. v. Coquillard, 2 Carter, Ind. 645.

² Western Mass. Ins. Co. v. Riker, 10 Mich. 279.

³ And see *ante*, § 264. If the conveyance is in effect an equitable mortgage, in the form of a deed of trust, it is not a change of title under the Georgia Code. Virginia, &c. Ins. Co. v. Feagin (Ga.), 9 Repr. 173.

and unconditional owner," if he is in possession and his claim is overdue. Carey v. Liverpool, &c. Ins. Co., 92 Wis. 538; Sun Fire Office v. Clark, 53 Ohio St. 414; Hawley v. London, &c. Ins. Co., 102 Cal. 651; see Carey v. Allemania F. Ins. Co., 171 Penn. St. 204. A fictitious mortgage made by one partner and kept by him is not an incumbrance under the insurance law. Fitchner v. Fidelity Mut. F. Ass'n, 103 Iowa, 276. Nor is a mortgage that was never delivered: Clifton Coal Co. v. Scottish Union Ins. Co., 102 Iowa, 300;

nor a mortgage or deed of a homestead signed only by the husband. German Ins. Co. v. York, 48 Kansas, 488. A lien for unpaid purchase-money is not fatal under an answer in the application that there is no mortgage. Phenix Ins. Co. v. Coombes (Ky.), 22 Ins. L. J. 155. As to alienations avoiding the policy, see further Morrison v. Tennessee M. & F. Ins. Co. (Mo.), 58 Am. Dec. 299, and note.

(a) See Sun Fire Office v. Clark, 53 Ohio St. 414; Gibb v. Phila. F. Ins. Co., 59 Minn. 267; Green v. Brand,

§ 269 a. **Mortgage; Entry of Foreclosure.**—In *McIntire v. Norwich Fire Insurance Company*,¹ the policy contained among its various conditions a stipulation in these words: “If the title of the property is transferred or changed, . . . this policy shall be void; and the entry of a foreclosure of a mortgage . . . shall be deemed an alienation of the property, and this company shall not be holden for loss or damage thereafter.” It was held that the words “the entry of a foreclosure” does not mean exactly the same as a consummated foreclosure, and that any act, which, of itself, without further formality or process on the mortgagee’s part, deprives the assured of all right and title in the property, unless the debt is paid, terminates the risk.²

¹ 102 Mass. 230.

² The court here said: “What are we to understand by the expression, ‘the entry of a foreclosure of a mortgage,’ which, according to the terms of the contract, ‘shall be deemed an alienation of the property.’ after which the defendants ‘shall not be holden for loss or damage’? It is a somewhat peculiar form of expression, not strictly and technically accurate, perhaps; but to be interpreted in such a manner as to carry out the true intent of the parties, so far as that intent is discoverable. In the case of a mortgage upon real estate, the mortgagee, on breach of condition, may enter for the purpose of foreclosure; and, although his title may become absolute by mere lapse of time, no other entry or formality may be required on his part; and there is nothing in any public record, or in any proceeding, which can literally be said to be an entry of foreclosure. In the case also of a mortgage of personal property, the mortgagee gives notice of his intention to foreclose, in the form prescribed by statute, and his title afterwards may become absolute without any further act or ceremony on his part. He cannot be said to enter upon the property, nor can it in a literal sense be said that there is

1 C. & E. 410; *Gerling v. Agr. Ins. Co.*, 39 W. Va. 689; *Small v. Westchester F. Ins. Co.*, 51 Fed. Rep. 789; *Georgia Home Ins. Co. v. Hall*, 94 Ga. 630; *Brick v. Campbell*, 122 N. Y. 337; *Phoenix Ins. Co. v. Asberry*, 95 Ga. 792. When the beneficiary is in possession and pays the premium, and the policy is issued to his trustee, and these facts are made known to the insurer’s agent, there is no forfeiture for non-ownership, or because the trustee afterwards conveys the property to the beneficiary. *Rhode Island Underwriters’ Ass’n v. Monarch*, 98 Ky. 305. See *Rochester Loan & B. Co. v. Liberty Ins.*

Co., 44 Neb. 537; *Phoenix Ins. Co. v. Bowdre*, 67 Miss. 620. A general assignment for the benefit of creditors usually avoids a policy under a clause therein against transfers. *Orr v. Hanover F. Ins. Co.*, 158 Ill. 149. But as a receiver appointed by the court has merely a right of custody, and the title to personalty is not changed by his appointment, such appointment is not a change of title by sale or judicial decree as to property previously conveyed voluntarily to trustees to secure creditors and insured by such trustees. *Georgia Home Ins. Co. v. Bartlett*, 91 Va. 305.

When, however, the title becomes absolute in the mortgagee or his assigns, by foreclosure, or, what is tantamount to a foreclosure, merger in the purchaser of the equity, who subsequently takes an assignment of the mortgage, the transfer is complete and the change of title is an alienation;¹ unless the insurance is by the mortgagor, for the benefit of the mortgagee, who signs the premium note and pays assessments, in which case, as the title and property remains in the hands of the person liable to the company, foreclosure is no alienation.² And the foreclosure must be absolute. If it be incomplete, and there is an outstanding equity of redemption, it is no sale or conveyance.³ But

an entry of foreclosure. In both cases, the first step towards foreclosure is the manifestation of the intent to foreclose, which is to be indicated in such manner as the law points out, accompanied with a formal registration in the public records. It is very manifest, as we think, that the words 'the entry of a foreclosure,' as used in the policy, are not to be interpreted as meaning exactly the same thing as a consummated and finished foreclosure. The policy provides not merely for the transfer, but the change of title, and the insurer may very naturally have considered an entry for foreclosure as a material change in the title of the assured, and in his relation to the property. The parties, in their contract, have taken pains to avoid saying simply that 'the foreclosure of a mortgage' shall be deemed an alienation. There would be no occasion for them to say that, inasmuch as the law would plainly have said it for them. The meaning of the policy, in our judgment, is, that something short of an actual and complete foreclosure shall be considered, for the purposes of their contract, as a transfer or change of title, and that an entry for foreclosure, or an act which of itself, and without any further formality or process on the part of the mortgagee, will deprive the assured of all right and title in the property, unless he pay the debt, shall be deemed sufficient to terminate the risk. The defendant might well be unwilling to continue to insure property which is so situated that its destruction by fire might be the easiest or only way to make it beneficial to the assured." In *Colt v. Phoenix Ins. Co.*, 54 N. Y. 595, the phrase "commencement of foreclosure proceedings" was held to have no reference to proceedings to enforce a mechanic's lien.

¹ *Macomber v. Cambridge Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 133; *McLaren v. Hartford Fire Ins. Co.*, 1 Seld. (N. Y.) 151; *Mt. Vernon Manufacturing Co. v. Summit County Mut. Fire Ins. Co.*, 10 Ohio St. 347; *Brunswick v. Commercial Ins. Co.*, 68 Me. 313.

² *Bragg v. N. E. Mut. Fire Ins. Co.*, 5 Fost. (N. H.) 289.

³ *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40; *Loy v. Insurance Co.*, 24 Minn. 315. See also *McKissick v. Millowners' Ins. Co.*, 50 Iowa, 116, where the foreclosure was held complete notwithstanding legal proceedings were pending to correct an error. The proceedings in this case were perfected and a decree had. In a case where proceedings were pending and afterwards dismissed, the court held that there was no foreclosure. *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. (Va.) 88. See also *Bishop v. Clay Ins. Co.*, 45 Conn. 430. See § 269, n.

a complete foreclosure under an invalid mortgage is no alienation.¹

§ 270. **Alienation; Chattel Mortgage.** — And a mortgage of personal property would seem to stand upon the same ground,² certainly while the mortgagor has the possession.³ (a) A mortgage is something less than an alienation.⁴ But in *Tallman v. Atlantic Fire and Marine Insurance Company*, it was held that the execution and delivery of a chattel mortgage was a "sale, transfer, or change of title," though it was not necessary for the court to go so far, as in fact there had been in that case, prior to the loss, a

¹ *Scammon v. Commercial Union Ins. Co.*, Ct. of App. (Ill.), 9 Ins. L. J. 715; *Jecko v. St. Louis, &c. Ins. Co.*, 7 Mo. (Ct. of App.) 308.

² *Holbrook v. Am. Ins. Co.*, 1 Curtis (U. S. C. Ct.), 193; *Van Deusen v. Charter Oak Fire & Mar. Ins. Co.*, 1 Robt. (N. Y. Superior Ct.) 55. [A provision that "if the property be sold or transferred, or any change take place in title or possession, whether by legal process and judicial decree, or voluntary transfer or conveyance," the policy should be void, is not violated by giving a chattel mortgage on the property. *Hennessey v. Manhattan Fire Ins. Co.*, 28 Hun, 98; *Hanover Fire Ins. Co. v. Connor*, 20 Brad. 297 (no breach until the mortgage matures).]

³ *Rice v. Tower*, 1 Gray (Mass.), 426; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9. [A deed pledging the property to secure a debt, the pledgor remaining in possession, does not avoid the policy. *Nussbaum v. Northern Ins. Co.*, 37 Fed. Rep. 524 (Ga.), 1889.]

⁴ *Orrell v. Hampden Fire Ins. Co.*, 13 Gray (Mass.), 431.

(a) See *Taylor v. Merchants' Ins. Co.*, 83 Iowa, 402; *Olney v. German Ins. Co.*, 88 Mich. 94; *Marotock Ins. Co. v. Rodefer*, 92 Va. 747; *Peet v. Dakota F. & M. Ins. Co.*, 7 So. Dak. 410; *German-American Ins. Co. v. Humphrey*, 62 Ark. 348; *Caplis v. American F. Ins. Co.*, 60 Minn. 376; *First National Bank v. American Central Ins. Co.*, 58 Minn. 492; *Wilcox v. Continental Ins. Co.*, 85 Wis. 193; *Smith v. Continental Ins. Co.*, 6 Dak. 433. A policy is only avoided by a change in the known incumbrances where there is an increase as to the amount thereof; but even if personal property be charged with a mortgage after insurance thereof, contrary to its terms, this does not prevent recovery if the mortgage is discharged before the loss occurs.

Johansen v. Home F. Ins. Co., 54 Neb. 548; *Omaha F. Ins. Co. v. Dierks*, 43 Neb. 473; *Gould v. Dwelling-House Ins. Co.*, 134 Penn. St. 570; *Russell v. Cedar Rapids Ins. Co.*, 78 Iowa, 216. See *German-American Ins. Co. v. Humphrey*, 62 Ark. 348. A mere renewal, subsequent to the insurance, of existing incumbrances, with accrued interest added, is not a new incumbrance within the meaning of a fire policy. *Kansas Farmers' F. Ins. Co. v. Saindon*, 52 Kansas, 486; 53 id. 623. Nor is the substitution of a new mortgage of substantially the same amount, when the mortgagee in the existing mortgage requires payment at maturity. *Koshland v. Home Ins. Co.*, 31 Oregon, 321; *Koshland v. Fire Ass'n*, id. 362.

foreclosure, with possession in the mortgagee, and no outstanding equity of redemption. The case was afterwards reversed,¹ under such a state of facts as brings the case into accord with the other authorities.

§ 271. **Mortgage is an Alteration of Ownership and Change of Interest.** — But a mortgage is an “alteration of ownership” within the meaning of a policy which inhibits an alteration of ownership upon penalty of forfeiture.² And so it is a violation of a provision against a sale or alienation “in whole or in part.” And, indeed, any disposition of the subject-matter of insurance, such that any property therein passes to another, amounts to an alienation of the property in part.³ And where the insured sells the insured property, receives pay in part, and retains a lien for a portion of the purchase-money, it is a “change of interest” which avoids the policy.⁴

§ 272. **Conditional Sale no Alienation; Absolute Deed intended as Security; Lease.** — A conditional sale is, however, no alienation; as where the assured executed a warranty deed of the premises, and at the same time received back from the grantee a deed of the same premises, with a condition that if he should pay to the assured a specified sum within a limited time, meanwhile, and until that sum should be paid the assured to retain possession of the premises, and, upon payment, the second deed to be void, but otherwise in force; and it appeared the grantee in the first deed never paid or agreed to pay the sum mentioned, and it was entirely optional with him whether to do so or not. The two deeds, being executed at the same time, are to be regarded as one contract, and were in effect the same as if the condition had been inserted in the first deed.⁵ Nor will a sale, absolute in form, if intended as security for a debt, nor any conveyance which a court of equity will treat as a mortgage, be

¹ 3 Keyes (N. Y.), 87.

² *Edmonds v. Mut. Safety Fire Ins. Co.*, 1 Allen (Mass.), 311.

³ *Abbott v. Hampden Mut. Fire Ins. Co.*, 30 Me. 414.

⁴ *Bates v. Com., &c. Ins. Co.*, 2 Cincinnati Superior Ct. Repr. 195; *O'Neil v. Ottawa Agr. Ins. Co.*, U. C. (C. P.) 15 Can. L. J. 207.

⁵ *Tittmore v. Vermont Mut. Fire Ins. Co.*, 20 Vt. 546.

deemed an alienation, whether there be any agreement in writing to that effect or not.¹ And a sale, with an agreement for resale, intended as a security, is no "transfer or termination of interest."² Nor is a sale of anything less than the whole interest.³ Proceedings "had, commenced, or taken" for a sale refer to proceedings taken by the insured, and not to proceedings under a foreclosure of a mortgage.⁴ Nor is an assignment as collateral security.⁵ Nor is a conveyance by the insured, with a simultaneous reconveyance to be held in trust for him.⁶ Nor is a lease.⁷ And when the policy stipulates against a "sale, transfer, or

¹ *Hodges v. Tenn. Mar. & Fire Ins. Co.*, 4 Seld. (N. Y.) 416. [A policy is not avoided by a deed intended only to secure a loan. *Insurance Co. v. Gordon*, 68 Tex. 144; *Barry v. H. B. Fire Ins. Co.*, 110 N. Y. 1. Where the intent and effect of a conveyance, though absolute in form, is really only security for debt, or the performance of some condition, there is no "sale." In this case the insured, I., conveyed to A. by deed absolute, A. executing a bond to reconvey on performance by I. of a condition named. The bond was not recorded and the company did not know of it. Subsequently, A., with the knowledge of I. and for his benefit, mortgaged the property to C. After the loss by fire, the mortgage was discharged and A. reconveyed to I., and it was held that the property had not been "sold." *Bryan v. Traders' Ins. Co.*, 145 Mass. 389. In Maine, however, the defeasance must be recorded. A. mortgaged his insured premises to B. and released his equity of redemption to C., taking back a bond of defeasance not recorded. This was held an alienation avoiding the policy. *Tomlinson v. Monmouth Mut. Fire Ins. Co.*, 47 Me. 232, 237. By the express words of the statute, a deed is not defeated unless the defeasance is recorded, the vendee of the equity had the record title, and might have conveyed a good title, or the land could have been attached as his property. In a court of law a deed absolute in itself will avoid the policy, as a change of title, although there may be an oral or written defeasance *dehors* the deed. The title passes by the deed to the grantee, although he may be equitably bound to use it for the benefit of the grantor, beyond the amount of the debt. "Oral evidence is not admissible in a court of law to show that a deed absolute on its face was intended as a mortgage." *Barry v. Hamburg-Bremen Fire Ins. Co.*, 53 N. Y. Super. 249, 253; *Webb v. Rice*, 1 Hill, 606.]

² *Holbrook v. Am. Ins. Co.*, 1 Curtis (U. S. C. C.), 193.

³ *Hitchcock v. Northwestern Ins. Co.*, 26 N. Y. 63. See also *Savage v. Long Island Ins. Co.*, 43 How. Pr. (N. Y.) 462.

⁴ *Michigan St. Ins. Co. v. Lewis*, 30 Mich. 41. See also *Strong v. Manufacturers' Co.*, 10 Pick. (Mass.) 40.

⁵ *Ayres v. Hartford Ins. Co.*, 21 Iowa, 193, 198; *Ayres v. Home Ins. Co.*, id. 185.

⁶ *Morrison v. Tenn. Mar. & Fire Ins. Co.*, 18 Mo. (3 Bennett) 262.

⁷ *Lane v. Maine Fire Ins. Co.*, 3 Fairf. (Me.) 44; *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289; *Hobson v. Wellington Dist. Ins. Co.*, 6 U. C. (Q. B.) 536.

change of title," a mere agreement between the owner of personal property insured and another person, to represent to the creditors of the owner, in order to prevent attachment, that it had been sold to such other person, amounts to neither; although, doubtless, something less than an alienation — as, for instance, a mortgage, or a conveyance of a portion of the interest of the insured, or one invalid as against creditors — would be a violation of the stipulation.¹

§ 273. **Transfer or Change of Title; Interest.** — As the object of providing against a transfer or change of title is to guard against a diminution in the strength of the motive which the insured may have to be vigilant in the care of his property, the substantial diminution of interest in the property insured has been suggested as a test of the kind of transfer or change of title which will avoid the policy.² A voluntary conveyance, however, is a change of title;³ and so is a conveyance by husband and wife, with a simultaneous reconveyance to the wife, to carry out the provisions of a will, devising the property to the wife.⁴ [The conveyance of a homestead by a husband to his wife is fatal as a change of title.⁵ Where a barn belonging to W. is insured to W. and his wife, and afterward conveyed by W. to G. and the same day over to W.'s wife, the policy was held avoided.⁶ But where A. transferred the property to B. and the latter reconveyed at once to A.'s wife, it was held that as A. had

¹ Orrell v. Hampden Fire Ins. Co., 13 Gray (Mass.), 431.

² Thus, in Ayres v. Hartford Fire Insurance Company, 17 Iowa, 176, the court in discussing what *transfer* or *change of title* would avoid the policy, held the following language: "The object of the insurance company by this clause is, that the interest shall not change so that the assured shall have a greater temptation or motive to burn the property, or less interest or watchfulness in guarding and preserving it from destruction by fire. Any change in or transfer of the interest of the insured in the property, of a nature calculated to have this effect, is in violation of the policy. But if the real ownership remains the same, — if there is no change in the *fact of title*, but only in the evidence of it, and if this latter change is merely nominal, and not of a nature calculated to increase the motive to burn, or diminish the motive to guard the property from loss by fire, — the policy is not violated."

³ Baldwin v. Phoenix Ins. Co. (N. H.), 10 Ins. L. J. 32.

⁴ Langdon v. Minnesota Mut. Ins. Co., 22 Minn. 193; *ante*, § 264.

⁵ [Milwaukee Mechanic's Ins. Co. v. Ketterlin, 24 Brad. 188.]

⁶ [Walton v. Agricultural Ins. Co., 116 N. Y. 317.]

an insurable interest at issue and at loss (by virtue of the curtesy initiate), the policy was not affected by the transfer.¹ A. owned certain land which was sold for taxes, and the purchaser conveyed the tax title to A.'s wife. A. insured the buildings on the land. Then the wife conveyed to C. the tax title, A. joining and releasing his curtesy. C. immediately conveyed the whole title to A. As A.'s curtesy was a sufficient interest to sustain his policy, and as the subsequent conveyances were simply for the purpose of completing title in him, it was held that the policy was good and that there was no breach of the condition against sale. "The seisin of the third person was instantaneous only, and he was a mere conduit through whom the full title was to be passed to the plaintiff. To hold the conveyance by the wife, her husband joining in it, to be a sale within the clause of the policy, would be to construe it too strictly, and to attribute to it a meaning which it was not intended to bear."² The truth is simply that the *reason* for the condition against sale, viz. to prevent separation of the interests in the policy and in the property so tempting to its destruction, does not apply to this case.] So is a conveyance in fee with a mortgage back,³ and the conveyance of an equity of redemption.⁴ And if there be a substantial diminution of interest, though it might amount to a sale,⁵ or change of interest,⁶ yet it would not amount to a "transfer or termination of the interest" of the insured, not being a transfer of the whole interest,⁷ nor to a "change of title."⁸ But a mortgagee's interest is changed to an absolute one by a foreclosure, and is "a change in title or possession" which prevents recovery.⁹

¹ [Caldwell v. Stadacona Fire & Life Ins. Co., 11 Can. Supr. Ct. 212.]

² [Kyte v. Commercial Union Assurance Co., 144 Mass. 45.]

³ Savage v. Howard Ins. Co., 52 N. Y. 502.

⁴ Little v. Eureka Ins. Co. (Cin. Supr. Ct.), 5 Ins. L. J. 154.

⁵ Savage v. Howard Ins. Co., *supra*.

⁶ Bates v. Buckeye Ins. Co. (Cin. Supr. Ct.), 4 Ins. L. J. 716.

⁷ Hitchcock v. Northwestern Ins. Co., 26 N. Y. 68.

⁸ Kitts v. Massasoit Ins. Co., 56 Barb. (N. Y.) 177. See also Phelps v. Gebhard Ins. Co., 9 Bosw. (N. Y.) 404.

⁹ Gaskin v. Phoenix Ins. Co., 6 Allen (N. B.), 429. See also *post*, § 294. [A foreclosure sale under a valid mortgage operates as a change of title. Com. Union Ass. Co. v. Scammon, 102 Ill. 46.]

[§ 273 A. **Change of Possession.** — A change of tenants, or occupancy of the house by the owner is not a "change of title or possession." That clause refers to the *right* of possession, not the occupancy.¹ (a) When the assured had made an oral executory contract to lease the insured premises, but the intended lessee had only entered by virtue of a parol license to make repairs, the clause in the policy prohibiting a change of title or possession was held not violated.²]

§ 274. **Alienation; Levy of Execution.** — A mere technical levy upon real estate or personal property, unaccompanied by change of possession or increase of risk, is not within the meaning of a policy which provides that insurance shall cease "if the property be levied upon or taken into possession or custody." The words "levied upon" are to be taken with what follows as explanatory.³ Nor is a wrongful levy, or one based on an illegal assessment;⁴ nor a levy which does not divest the title.⁵ A seizure of the goods insured, though taken into the actual possession of the sheriff, is not an alienation, if there is no removal. The general property in goods seized on execution remains in the debtor till they are sold. The right of the sheriff by virtue of the seizure is defeasible, it being his duty to release and restore the goods to the defendant in the execution, upon a tender of the

¹ [Pool v. Hudson Ins. Co., 2 Fed. Rep. 432, 1880; 1st Cir. (N. H.) 9 Ins. L. J. 428; Rumsey v. Phoenix Ins. Co., 1 Fed. Rep. 396; 17 Blatch. 527, 2d Cir. N. Y. 1880.]

² [Alkau v. New Hampshire Ins. Co., 53 Wis. 136, 148.]

³ Commonwealth Ins. Co. v. Berger, 42 Pa. St. 285; Smith v. Farmers', &c. Ins. Co., 89 Pa. 287.

⁴ Philadelphia Ins. Co. v. Mills, 44 Pa. St. 241; Miami, &c. Ins. Co. v. Stanhope, Ham. Co. Dist. Ct. (Ohio), 10 Ins. L. J. 159; Runker v. Citizens' Ins. Co., C. Ct. (Ohio), 6 Fed. Rep. 143.

⁵ Pennebaker v. Tomlinson, 1 Tenn. Ch. 598.

(a) Such clause does not apply to a surrender by the insured tenant to his landlord, if the insured's agent informs the latter, who notifies him, that the policy need not be changed. West Coast Lumber Co. v. State Inv. & Ins. Co., 98 Cal. 502. See Smith v. Phoenix Ins. Co., 91 Cal. 323; 21 Ins. L. J. 137,

416. A leasehold is an insurable interest. Phila. Tool Co. v. British-American Ass. Co., 132 Penn. St. 236. As to disclosing that the buildings are on leased land, see Ins. Co. v. Nat'l Bank, 88 Tenn. 369; West Coast Lumber Co. v. State Inv. & Ins. Co., *supra*.

amount due.¹ The same is true of a seizure of an equity of redemption of real estate; for after a sale of the equity there is still left a right to redeem, — a right which may constitute a valuable interest. So, at least, will the law presume, in the absence of evidence to the contrary.² (a) A sale in execution is an “incumbrance by a sale” while an equity of redemption remains. When the equity is gone, such a sale becomes an alienation.³ [A sale of real estate upon execution is not a “levy.” That word only applies to personal property.⁴ (b)]

§ 275. **Change of Title; Increase of Interest.** — It seems hardly necessary to say that any change of title whereby the interest of the insured becomes enhanced, and his incentives to vigilance increased, as would be the case where a title becomes absolute in the mortgagee by foreclosure, or a ten-

¹ Rice v. Tower, 1 Gray (Mass.), 426, 427. In this case Metcalf, J., said: “There are *obiter dicta* in the books, that by a seizure on a *fi. fa.* the debtor’s property in the goods is lost; that the sheriff acquires a special property, but that the general property of the debtor is divested and is in abeyance. But the law never was so.” Referring to 1 Lev. 282; 1 Vent. 53; 6 Mod. 293; Holt, 647; 4 Mass. 403; 2 Mass. 517. See also May v. Standard Ins. Co., U. C. (Ct. of App.), 16 Canada L. J. 271, reversing s. c. in 30 U. C. (C. P.) 656. See also *ante*, § 249; Franklin Fire Ins. Co. v. Finlay, 6 Whart. (Pa.) 483.

² Strong v. Manufacturers’ Ins. Co., 10 Pick. (Mass.) 40, 44 · Clark v. New England Mut. Ins. Co., 6 Cush. (Mass.) 342.

³ Campbell v. Hamilton Mut. Ins. Co., 51 Me. 69.

⁴ [Hammel v. Queen’s Ins. Co., 54 Wis. 72, 85; Shafer v. Phoenix Ins. Co., 53 Wis. 361, 369.]

(a) See Collins v. London Ass. Corp., 165 Penn. St. 298; Walradt v. Phoenix Ins. Co., 136 N. Y. 375.

(b) Where, as in New York, the effect of a sale of real estate is declared by statute, the judgment debtor being there allowed fifteen months to redeem, and meantime being entitled to the possession and use, or the rents and profits, a mere sale on execution is not such a change of title or possession as avoids a fire policy. Wood v. American F. Ins. Co., 149 N. Y. 382; Walradt v. Phoenix Ins. Co., 136 N. Y. 375. See Horton v. Va. L. Ins. Co., 122 N. C. 498; Hanover F. Ins. Co. v. Brown, 77 Md. 64; Merchants’ Ins. Co. v. Brown, *id.*

79; Browne Nat. Bank v. Southern Ins. Co. (Wash.), 60 Pac. 1123. An actual attachment by a duly authorized officer is, however, treated as a change of possession under “legal process.” Carey v. German-American Ins. Co., 84 Wis. 80; Lane v. Maine Mut. F. Ins. Co., 28 Am. Dec. 150, 158, note. In general, any sale or alienation *in invitum* does not avoid when it is not valid as against the insured; this applies to a voidable sale which, if not ratified by the insured, will not defeat or delay recovery upon the policy for a loss accruing before the sale is set aside. Niagara F. Ins. Co. v. Scammon, 144 Ill. 490.

ant for years or for life purchases the fee, — in other words, a sale or conveyance to the assured, — though within the words of the proviso against sale or transfer, is not within its spirit and purpose, and will not vitiate the policy.¹ (a)

§ 276. **Alienation by Mortgagor after Assignment of Policy.** — Though it be stipulated that the policy shall be void by alienation, this must be held to mean alienation by the party insured. If the original insured, by the consent of the insurers, assigns the policy, and the assignees agree with the insurers to pay all assessments which shall thereafter be made upon the policy, and that the property insured shall remain subject to the same lien as before, the legal effect of the transaction is to create a new, substantive, and distinct contract with the assignees. It is substantially the same as if the policy had been issued to them. An alienation, therefore, by a mortgagor of his equity of redemption, after an assignment of the policy, under the circumstances just stated, is not an alienation by the assured, but rather by a stranger over whom the assignees have no control, and for whose acts they are not at all responsible, and does not avoid the policy.² (b)

¹ *Bragg v. New England Mut. Fire Ins. Co.*, 5 Fost. (N. H.) 289; *Heaton v. Manhattan Fire Ins. Co.*, 7 R. I. 502; [*Bailey v. American Cent. Ins. Co.*, 13 Fed. Rep. 250; 8th Cir. (Iowa), 1882.]

² *Foster et al. v. Equitable Mut. Fire Ins. Co.*, 2 Gray (Mass.), 216; *Bragg v. New England Mut. Fire Ins. Co.*, 5 Fost. (N. H.) 289; *Boynton v. Clinton & Essex Mut. Ins. Co.*, 16 Barb. (N. Y.) 254. And see also *Fogg v. Middlesex Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 337; *Francis v. Butler Mut. Fire Ins. Co.*, 7 R. I. 159.

(a) A change of title by which contingent interests become absolute, or which increases the insured's interest from a lien-holder to absolute ownership, is not such a change of ownership as requires notice to the insurer under a mortgage-subrogation agreement. *Dodge v. Hamburg-Bremen F. Ins. Co.*, 4 Kans. App. 415; *Continental Ins. Co. v. Ward*, 50 Kansas, 346.

(b) If the policy does not stipulate against incumbrances, or if it requires disclosure of incumbrances, mortgages upon the property made after the insurance do not affect it. *Hartford Steam*

Boiler Insp. Co. v. Lasher Stocking Co., 66 Vt. 439; *Collins v. Merchants' Mut. Ins. Co.*, 95 Iowa, 540; *Koshland v. Hartford F. Ins. Co.*, 31 Oregon, 402. The violation of a by-law of a mutual company, which forbids transfer by mortgage, is fatal to a recovery on the policy. *Pfister v. Gerwig*, 122 Ind. 567. Under the New Hampshire statute, the assured's error, such as the omission to have an existing mortgage noted in the application and policy, if occasioned by an innocent mistake, does not avoid the policy. *Perry v. Dwelling-House Ins. Co.*, 67 N. H. 291.

[§ 276 A. **Fatal Cases.** — Insolvency does not excuse the effort to obtain consent to a change of interest.¹ (a) If partnership property is put into the hands of a receiver before loss, the transfer is an alienation that avoids the policy. The same is true of an assignment in bankruptcy.² When the policy is to be void, if the assured shall dispose of all his interest in the property, and he makes a sale of it on credit, his equitable lien for the purchase-money will not keep the policy alive.³ A policy with the customary clause against alienation was avoided, when the assured sold the premises to a third party, and took a mortgage for the price, although the mortgagee was to retain possession until the price was paid.⁴ A deed absolute, a part consideration for which is a return deed covenanting to permit the insured to occupy the premises during his life, is a breach of the condition against transfer or change of title.⁵ A sale by the heirs of the assured to a mortgagee, with no mention of the mortgage, avoids a policy on the property.⁶]

[§ 276 B. **Cases not Fatal.** — The execution of a trust-deed is not a transfer or change of title that will avoid a policy.⁷ If A. gives a trust-deed on his property to secure a debt, and then insures, a sale by the trustee to himself or to me, for his benefit, under a power in the trust-deed, will not avoid the policy. The sale will be set aside.⁸ A sale by a school committee of a school-house, on credit, they being unauthorized so to sell, and the act not being ratified, does not pass the title thereto, and a renewal of a policy during the controversy is binding, there being a good title in the original owners.⁹

¹ [Hine v. Woolworth, 93 N. Y. 75.]

² [Keeney v. Home Ins. Co., 3 T. & C. 478, 482.]

³ [Cal. State Bank v. Hamburg-Bremen Ins. Co., 71 Cal. 11.]

⁴ [Tittmore v. Vt. Mut. Fire Ins. Co., 20 Vt. 546, 550.]

⁵ [Farmers' Ins. Co. v. Archer, 36 Ohio St. 608.]

⁶ [Dailey v. Westchester Fire Ins. Co., 131 Mass. 173, 174.]

⁷ [Nease v. Aetna Ins. Co., 18 Ins. L. J. 541, (W. Va.) March, 1889.]

⁸ [Com. Union Ass. Co. v. Scammon, 126 Ill. 355.]

⁹ [School Dist. in Dresden v. Aetna Ins. Co., 62 Me. 330, 339.]

(a) See McElroy v. John Hancock *In re* Equitable Reserve Fund L. Ass'n, Mut. L. Ins. Co., 88 Md. 137; Brown 131 N. Y. 354.
v. Cotton, &c. Ins. Co., 156 Mass. 587;

On April 16, a ship received fatal injuries, but by great exertion was kept afloat until May 5, when she was abandoned and went down. On April 24, one-quarter interest was sold. It was held that the company was liable for the whole loss, as the fatal injury occurred before the sale, and so in legal construction the loss also.¹ When a policy provides that it shall be void if the property is sold or conveyed, it is not avoided by the sale of a part interest in the premises. The policy still covers the interest remaining in the assured.² Sale of the land under the insured buildings, reserving them, is not fatal to the policy.³ A mere agreement between the assured and a third party to call the insured property sold, to prevent creditors from attaching, is not an alienation sufficient to avoid the policy.⁴ Giving a lease with the privilege of purchase at a price named, is not an alienation.⁵

[§ 276 C. *Foreclosure*. — Where a fire occurs on the very day of a foreclosure sale, but before it the loss occurs before alienation.⁶ When mortgaged property is insured pending foreclosure proceedings, for the benefit of the mortgagee and his assigns, the company cannot defend on the ground of change of ownership by the foreclosure sale.⁷ A sale on foreclosure, no deed having been executed or report of sale made, does not violate the condition against transfer.⁸ And the deed must not only be made but delivered.⁹ When the policy is to be void for selling or transferring or making a change in the title or possession, it is held that neither a mortgage nor foreclosure proceedings before the equity of redemption has expired avoid it.¹⁰ (a) But if property on

¹ [Duncan v. Great Western Ins. Co., 3 Keyes (N. Y.), 394, 396.]

² [Scanlon v. Union Fire Ins. Co., 4 Biss. 511, 512.]

³ [Washington Mills Emery Manuf. Co. v. Commercial Fire Ins., 12 Ins. L. J. 181; 1st Cir. (Mass.) 1883.]

⁴ [Orrell v. Hampden Fire Ins. Co., 13 Gray, 431, 434.]

⁵ [Planters' Mut. Ins. Co. v. Rowland, 66 Md. 236.]

⁶ [Pearman v. Gould, 42 N. J. Eq. 4.]

⁷ [German Ins. Co. v. Churchill, 26 Brad. 206.]

⁸ [Haight v. Continental Ins. Co., 92 N. Y. 51.]

⁹ [Marts v. Cumberland Ins. Co., 44 N. J. 478.]

¹⁰ [Loy v. Home Ins. Co., 24 Minn. 315, 318. See §§ 269-269 a.]

(a) See Brown v. Cotton & W. M. Ins. Co., 156 Mass. 587.

which a mortgage has been foreclosed is insured, the policy becomes void when the period of redemption expires, for the property is then alienated, and a vote of the mortgagee next day extending the time of redemption cannot save the policy. It comes too late, and it is an agreement without consideration and not binding.¹ A decree for sale in an ordinary foreclosure suit is not such "a judgment in foreclosure proceedings" as will avoid a policy.² To have such consequences it must be a judgment that will of itself effect an alienation. And the mere *commencement* of foreclosure proceedings will not affect the policy; the foreclosure must be complete and valid (§ 269 *a* near the end). Such *commencement* is not a "change of ownership or increase of hazard."³ If however the policy expressly provides that the *commencement* of foreclosure proceedings shall avoid it, the condition will be enforced.⁴ But where an application truly stated that no foreclosure proceedings had been begun and the policy stipulated that the commencement of any foreclosure proceedings shall immediately render this policy void, and no such proceedings were begun *after* the policy was issued, but there were such begun *between* the date of the application and the date of the policy, it was held that the company was bound, and the policy was not forfeited. The insurer must stipulate for the intervening period if he would cover it.⁵ (*a*)

§ 277. **Alienation; Entire Contract.** — As a general rule, a breach of condition, where the contract is entire,⁶ affects all

¹ [Essex Savings Bank v. Meriden Ins. Co., 57 Conn. 335.]

² [Kane v. Hibernia, 38 N. J. L. 441, 455.]

³ [Phoenix Ins. Co. v. Union Mut. Life Ins. Co., 101 Ind. 392.]

⁴ [Meadows v. Hawkeye Ins. Co., 62 Iowa, 387.]

⁵ [Day v. Hawkeye Ins. Co., 72 Iowa, 597, 599.]

⁶ [The language used by May in this and the following section might lead one to suppose that although the contract were entire it might not be avoided

(*a*) See Breedlove v. Norwich Union Wash. 175; Same v. St. Paul F. & M. F. Ins. Co., 124 Cal. 164; Hanover F. Ins. Co., 68 Minn. 170; Washburn Ins. Co. v. Brown, 77 Md. 64; Continental Ins. Co. v. Anderson, 107 Ga. 68; Bellevue Roller-Mill Co. v. London & L. Ins. Co. (Idaho), 39 Pac. 196; 541; Hartford F. Ins. Co. v. Keating, 86 Md. 130; Pioneer Sav. & L. Co. v. Tierney v. Phenix Ins. Co., 4 No. Dak. Providence-Washington Ins. Co., 17 565.

the property insured, though it may be of different kinds and separately appraised in the policy.¹ If the premium be entire, separate valuations upon separate parcels of property have only the effect to limit the risk on each parcel.² Thus the alienation of a house vitiates the policy both as to the house and the furniture in it.³ So, also, the sale by a partner of his undivided interest avoids a policy containing a prohibition of such sale as to the interests of the other partners.⁴ Misrepresentation as to the title to a store, or amount

by a breach as to part of the property. I have seen no case which holds this. The question is in every case *whether the contract is entire*. If it is, a breach as to part breaks it all, if not entire, a part may still be good. The difficulty is to arrive at a test of entireness. The cases look to the premium, the apportionment of the insurance, and the language of the conditions. There are three questions in such cases. (1) Is it *possible* to separate the policy? (2) If so, have the parties clearly indicated an intent that it should not be separated? (3) If not, and separation is possible, is it fair and just that it should be made? It is not just if there is bad faith on the part of the assured. One who endeavors to defraud should not be aided by the law. But in case of breach without bad faith, division should be made if it can be done without injustice to the insurer, and in deciding this point the test used in a recent Indiana case seems valuable. The court said that where the property is so situated that the risk on one specific item in the policy affects the others, the contract is entire, but where it does not so affect the others the contract is separable; for example, a policy on a barn and a house standing apart is separable. *Phenix Ins. Co. v. Pickel*, 18 Ins. L. J. 592 (Ind.). The premium was entire in this case, but the insurance was apportioned.]

¹ [As a rule a policy void in part is void *in toto*. *McGowan v. People's Mut. Fire Ins. Co.*, 54 Vt. 211. If there is bad faith in any way entering into the contract, the insured ought to lose the whole benefit. Good faith is a condition distributed over the whole agreement. If however he has acted in good faith and the policy is divisible, as where the insurance on the different items is separately named, and the premium is apportioned, or is apportionable by plain mathematical principles, as in case of the insurance of three houses all just alike, then an avoidance as to one part should not affect the rest. It must be confessed, however, that the authorities as a whole by no means take a view so free of technicalities. In case of a divisible policy where actual fraud is absent, a misrepresentation will only cause a forfeiture in respect to the property affected by the untruth. *Insurance Co. of N. A. v. Hofing*, 29 Ill. App. 180. A policy insuring several detached buildings is not avoided as to all by a breach of warranty respecting some. *Pickel v. Phenix Ins. Co.*, 18 Ins. L. J. 598, (Ind.) June, 1889.]

² *Plath v. Minnesota Farmers' Ins. Co.*, 23 Minn. 479; [*Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202.]

³ *Barnes v. Union Mut. Fire Ins. Co.*, 51 Me. 110. See also *ante*, § 189; [Insurance on a house and its furniture is substantially one risk. *Havens v. Home Ins. Co.*, 111 Ind. 90.]

⁴ *Dix v. Mercantile Ins. Co.*, 22 Ill. 272.

of incumbrance thereon, or other material fact, vitiates the insurance both upon the store and the stock of goods therein.¹ [A breach of warranty as to some of the property covered by an entire policy avoids it as to the whole, though there are several different kinds of property insured.² When a policy insured against fire three adjoining buildings for \$666.66 $\frac{2}{3}$ on each building, and when in one house business was carried on which avoided the policy, and which caused an explosion whereby all three houses were injured, it was held that the contract was entire and there could be no recovery,³ although the owner did not know that the tenant kept gunpowder in the house.] Additional insurance, without notice, on stock vitiates the policy both on the stock and fixtures.⁴ The appropriation of one of two buildings, both included in the policy and insured for distinct amounts to a more hazardous use, vitiates the policy as well upon the one not so appropriated as upon the other.⁵ So false swearing as to value of goods lost vitiates policy upon both building

¹ *Gould v. York County Mut. Fire Ins. Co.*, 47 Me. 403; *Lovejoy v. Augusta Mut. Fire Ins. Co.*, 45 id. 472; *Friesmuth v. Agawam Mut. Ins. Co.*, 10 Cush. (Mass.) 587; *Brown v. People's Mut. Ins. Co.*, 11 Cush. 280; *Richardson v. Maine Ins. Co.*, 46 Me. 394; *Day v. Charter Oak Fire Ins. Co.*, 51 id. 91; *Hinman v. Hartford Fire Ins. Co.*, 36 Wis. 159; *Bleakley v. Niagara Dist. Mut. Fire Ins. Co.*, 16 Grant, Ch. (U. C.) 198; *ante*, § 189; *post*, § 290; *Ætna Ins. Co. v. Resh* (Mich.), 9 Ins. L. J. 549; *Schunilsh v. American Ins. Co.* (Wis.), 9 Ins. L. J. 56 and note; *Gottzman v. Penn. Ins. Co.*, 56 Pa. St. 210; *Whitwell v. Putnam Ins. Co.*, 6 Lans. (N. Y.) 166. The law in Canada seems to be unsettled, the latest case, by a divided court, holding that, where there are distinct subjects of insurance at specified amounts, misrepresentation as to one does not prevent recovery on the other, although the premium paid is but a single sum applicable to both. See *Samo v. Gore Dist. Mut. Fire Ins. Co.*, 1 Ont. App. Rep. 375, where the several opinions seem to cover the whole field of Canadian jurisprudence on this point. This case was, however, reversed on appeal, 2 Can. Supr. Ct. Rep. 411, that court holding the law to be in accordance with the doctrine of the text. See also *Russ v. Mut. Fire Ins. Co.*, 29 U. C. (Q. B.) 73.

² [*Cuthbertson v. Insurance Co.*, 96 N. C. 480, 487.]

³ [*Fire Ass. v. Williamson*, 26 Pa. St. 196, 198.]

⁴ *Kimball v. Howard Fire Ins. Co.*, 8 Gray, 33; *Associated Firemen's Ins. Co. v. Assum*, 5 Md. 165; *Ramsay et al. v. Mut. Fire Ins. Co.*, 11 U. C. (Q. B.) 516; *Bellington v. Can. Mut. Fire Ins. Co.*, 39 U. C. (Q. B.) 433; *Elliott v. Lycoming, &c. Ins. Co.*, 66 Pa. St. 22. Otherwise if insured in two distinct policies. *Franklin, &c. Ins. Co. v. Brock*, 57 Pa. St. 74.

⁵ *Lee v. Howard Fire Ins. Co.*, 3 Gray (Mass.), 583; *Fire Association of Phila. v. Williamson*, 26 Pa. St. 196.

and merchandise.¹ [So where a joint policy was taken out on the several interests of a widow and her children, and the premium was not apportioned, but was paid as a whole consideration, it was held that if action was barred by limitation or breach of condition or attempt of one party to defraud the company, the whole policy was avoided.²] And an alienation by a mortgagor of part of the premises upon which he had effected insurance, after an assignment of the policy with the consent of the insurers to the mortgagee, who signed the premium note, will avoid the policy *in toto* as to the mortgagor's interest.³ If the premium be entire, and likewise the deposit note, and the lien for the assessment on the same attach to all the separate parcels, the contract is entire, and if void at all is void *in toto*, although several sums are designated as insured upon the several parcels. But if the several parcels are insured in several sums, each having its specific premium and deposit note, and for which a distinct lien can be asserted, then an alienation of one parcel is only an avoidance of the policy *pro tanto*.⁴

§ 278. **Alienation of one of several Distinct Parcels of Property.** — But the authorities are not all agreed upon the point that a violation of a condition, or a misrepresentation as to part of the property insured, avoids the policy as to the whole when the contract is entire. [In a New Hampshire case it was said, when the assured alienates without the company's consent one of several parcels of real estate covered by a policy which stipulated against alienation, the policy is avoided as to all unless the court can say as a matter of law that the risk is not increased.⁵] In *Lochner v. Home Mutual Fire Insurance Company*,⁶ it was held that

¹ *Cushman v. Liverpool, &c. Ins. Co.*, 5 Allen (N. B.), 246. [Although the policy insures the building and its contents by separate amounts. *Harris v. Waterloo Mut. Fire Ins. Co.*, 10 Ont. R. 718, (so provided by statute).]

² [*Monaghan v. Agri. Fire Ins. Co.*, 53 Mich. 238, 252-253.]

³ *Boynton v. Clinton & Essex Mut. Ins. Co.*, 16 Barb. (N. Y.) 254.

⁴ *Friesmuth v. Agawam Mut. Ins. Co.*, 10 Cush. (Mass.) 587; *ante*, §§ 189, 228.

⁵ [*Baldwin v. Hartford Fire Ins. Co.*, 60 N. H. 422, 424.]

⁶ 17 Mo. 247; s. c. affirmed, 19 Mo. 628. See also *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; *Koontz v. Hannibal, &c. Ins. Co.*, 42 Mo. 126.

a misrepresentation as to the title of the house insured only vitiates the policy as to the house, and that a recovery might be had for the loss of furniture insured in the same policy under a separate valuation. "With respect to the furniture and the piano," say the court, "although they may be regarded as being insured in the building covered by the policy, yet, because the statute arbitrarily avoids the policy as to the building for want of a disclosure of the fact which did not at all affect the risk, we cannot come to the conclusion that the policy was likewise void as to the furniture and piano." And in *Phoenix Insurance Company v. Lawrence*,¹ where the interest of the insured in a storehouse was untruly stated, it was nevertheless held that the plaintiff might recover for the goods therein insured in the same policy, and upon a distinct and separate valuation, although the premium paid was an entire sum. In the last case, the case of *Clark v. New England Mutual Fire Insurance Company*² was relied upon, where the court held that, there being separate and distinct insurance upon two buildings, alienation of one would not avoid the policy as to the other.³ And a sale by the insured of one of several distinct parcels of real estate covered by the policy, that part forming a distinct item, with separate and distinct valuation, does not avoid the policy except *pro tanto*; as to the property still held by the insured at the time of the loss, he is entitled to recover according to the terms of the policy.⁴ Nor does the assignment of part of a mortgage debt.⁵ Nor upon principle does it seem to be of any consequence whether the val-

¹ 4 Met. (Ky.) 9.

² 6 Cush. (Mass.) 342.

³ The report does not show whether the premium was an entire sum or not; but on reference to the record it is found that the plaintiff was insured for \$2,500, — \$2,200 on his tavern-house and \$300 on his shop, — for which was paid a cash premium of \$5, and a deposit note of \$371 given. Upon these facts the case is not now law in Massachusetts, though it does not appear to have been overruled or even referred to in the subsequent cases. See the preceding section.

⁴ *Clark v. New England Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 342. And see also *Bodley et al. v. Chenango Mut. Ins. Co.*, 2 Comst. (N. Y.) 53.

⁵ *Rex v. Ins. Co.*, 2 Phila. (Pa.) 357.

uation be separate and distinct or not. Surely a merchant who insures his store and stock in trade, or a farmer who insures his barn and contents, may recover for the unsold balance of his stock, notwithstanding he daily sells a portion of it. The diminution of insurable interest coincides with a diminution of the right to claim for loss, and relatively there is no change in the situation. To say that the policy is thereby *pro tanto* avoided, is not so correct an expression as to say that the amount which the insured would have the right to recover under it is *pro tanto* reduced.¹ Nor will the result be different, though it be stipulated that the policy is to be void upon a sale of the whole or any part of the property insured. Nothing short of a sale of the whole will deprive the insured of his right to recover at all. If he sells a part, he merely forfeits the right to claim for the loss of that part, and for the simple and obvious reason that, having sold it prior to the fire, he did not, and could not, lose it. But if he keeps up his stock he recovers to the full amount.² So where one horse is exchanged for another.³ And so it has been held that where a policy provides that if the property shall be sold without consent of the company, the policy should be void, and also provides that where the property is sold, the insurance on such property shall terminate, a sale of part of the property does not avoid the policy except as to that part.⁴ In some cases the policy provides that the insurance shall be void only as to those parcels with reference to which the breach takes place.⁵ [When different goods are specifically and severally insured in the same policy, the amount and value of each being specified, the assured may abandon some one kind in case of loss and retain the rest as though they were insured in separate policies.⁶

¹ Lane v. Maine Mut. Fire Ins. Co., 3 Fairf. (Me.) 44; Hobbs *et al.* v. Memphis Ins. Co., 1 Sneed (Tenn.), 444.

² Wolfe v. Security Fire Ins. Co., 39 N. Y. 49; Peoria Mar. & Fire Ins. Co. v. Anapow, 51 Ill. 283.

³ Mills v. Farmers' Ins. Co., 37 Iowa, 400.

⁴ Quarrier v. Insurance Co., 10 W. Va. 507.

⁵ Daniel v. Robinson, Batty (Irish), 650.

⁶ [Diedericks v. Com. Ins. Co., 10 Johns. 234, 236.]

Where two persons jointly insured a building and it turned out that one of them had no insurable interest, the other could nevertheless recover on the policy.¹]

§ 279. **Alienation by one Joint Owner to another.**— Much discussion has been had in the courts upon the question whether a sale by one joint owner to another is an alienation which avoids the policy; but the better opinion seems to be that it is not strictly speaking an alienation, a transfer from one to another, but rather a shifting of interests amongst joint owners, without the introduction of any stranger to the number of the insured. So far as the contract is based upon the personal qualities of the insured, there is no increase of risk, because no element of improvidence or carelessness is introduced, and the property insured will still be under the care and management of the original parties.² But the rule was held to be otherwise in *Dey v. Poughkeepsie Mutual Insurance Company*,³ if by the

¹ [*Perry v. Mechanics' Mut. Ins. Co.*, 11 Fed. Rep. 478; 11 Ins. L. J. 409 1st Cir. (R. I.) 1882.]

² *Hoffman v. Aetna Fire Ins. Co.*, 1 Robt. (N. Y. Superior Ct.) 501; s. c. affirmed, 32 N. Y. 405; *Pierce v. Nashua Fire Ins. Co.*, 50 N. H. 297; *Burnett v. Eufaula Home Ins. Co.*, 46 Ala. 11; *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 401, 412; *Tallman v. Atlantic Ins. Co.*, 29 How. (N. Y.) 71; *Tillou v. Kingston Mut. Fire Ins. Co.*, 7 Barb. (N. Y. Sup. Ct.) 570; *Wilson v. Genessee County Mut. Ins. Co.*, 16 id. 511; *West v. Citizens' Ins. Co.*, 27 Ohio St. 1; *Cowan v. Iowa St. Ins. Co.*, 40 Iowa, 551. See also Judge Bennett's note to *Hobbs v. Memphis Ins. Co.*, 3 Ben. Fire Ins. Cas. 49. [Sale or mortgage of other transactions between partners relative to partnership property constitute no violation of the condition against transfer or change of title. *Dresser v. United Fireman's Ins. Co.*, 45 Hun, 298; *New Orleans Ins. Ass. v. Holberg*, 64 Miss. 51; *Combs v. Shrewsbury Ins. Co.*, 34 N. J. Eq. 403, 412; *Texas Banking & Ins. Co. v. Cohen*, 47 Texas, 406, 412 (sale and retirement); *Klein v. Union Fire Ins. Co.*, 3 Ont. R. 234. When a policy prohibits assignment it does not include the assignment of one partner to the other. The transfer from one partner to another is an occurrence so common in business that the parties are presumed to have contracted in reference to it. If they wished to exclude it, a stipulation to that effect should have been inserted in the policy. *Dermani v. Home Ins. Co. of N. Y.*, 26 La. An. 69, 71. A sale alone or a sale and mortgage back between partners of the partnership property is not a breach of the condition against sale, nor does it as a matter of law increase the risk. Partners are to be regarded as so far one person in regard to partnership property that dealings among themselves do not fall fairly within the meaning of the prohibitions of the policy. *Powers v. Guardian Ins. Co.*, 136 Mass. 109.]

³ 23 Barb. (N. Y.), 623; [*Card v. Phoenix Ins. Co.*, 4 Mo. Ap. 424, 427. If the policy is to be void in case of transfer or change of title, a dissolution

change in the partnership a new member is introduced.¹ It has also been held that where such a change of property has been made, recovery can be had only for the loss of so much as has not been transferred, — *i.e.* the interests of the remaining parties.² But upon principle it seems to be reasonable that the plaintiffs, being owners at the time of the insurance and thence to the loss, should recover the entire loss. And such seems to be the weight of authority.³ (a)

of the partnership and division of goods before loss, or a transfer by one partner to a stranger, is fatal. *Card v. Phoenix Ins. Co.*, 4 Mo. App. 427; citing *Savage v. Insurance Co.*, 52 N. Y. 506; *Dreher v. Insurance Co.*, 18 Mo. 128. The taking in of a partner by one who is insured individually is such a change of title and possession as avoids the policy. *Malley v. Atlantic Ins. Co.*, 51 Conn. 222. A change of a stock of goods, selling and replacing, does not avoid a policy; but a sale in mass, or a diminution of the owner's interest, or the introduction of a new member into the firm, as in this case is fatal: *Biggs v. Insurance Co.*, 88 N. C. 141, 144; citing *Dey v. Poughkeepsie Mut. Ins. Co.*, 23 Barb. 623; [and not alone as to the goods or interest sold, but the contract being entire is wholly avoided. *Id.*, &c.; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507.]

¹ [In Maryland it is held that taking in a new partner without notice to the company does not affect the validity of a renewal made *after* the change. A renewal receipt is a new parol contract, and absence of notice to the company that a new member has come into the firm since the original insurance, is not material. The new contract is made with the firm as constituted at the time of it. *Firemen's Ins. Co. v. Floss & Co.*, 67 Md. 404.]

² *Hobbs v. Memphis Ins. Co.*, 1 Sued (Tenn.), 444.

³ *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 415; *West v. Citizens' Ins. Co.*, 27 Ohio St. 1.

(a) Agreements between co-partners as to the firm's personalty or change of members are now generally treated as not working a material change of title, when the hazard is not increased. *Georgia Home Ins. Co. v. Hall*, 94 Ga. 630; *Runkle v. Hartford Ins. Co.*, 99 Iowa, 414; *Phenix Ins. Co. v. Holcombe*, 57 Neb. 622, 629; *Virginia F. & M. Ins. Co. v. Vaughan*, 88 Va. 832; *Brigham v. Wood*, 48 Minn. 344; *New Orleans Ins. Ass'n v. Holberg*, 64 Miss. 51; *Allemania F. Ins. Co. v. Peck*, 133 Ill. 220; *Blackwell v. Ins. Co.*, 48 Ohio St. 533. See *Jones v. Phoenix Ins. Co.*, 97 Iowa, 275; *American Credit Ind. Co. v. Wood*, 73 Fed. Rep. 81; *Germania F. Ins. Co. v. Home Ins. Co.*, 144

N. Y. 195; *Roby v. American Central Ins. Co.*, 120 N. Y. 510; *Hanover F. Ins. Co. v. Lewis*, 28 Fla. 209; *Southern Fertilizer Co. v. Reams*, 105 N. C. 283.

Partition is a change of title; but a change of ownership as to a building does not forfeit as to personalty therein, when they are separately insured. *Trabue v. Dwelling-House Ins. Co.*, 121 Mo. 75; *Coleman v. New Orleans Ins. Co.*, 49 Ohio St. 310; *Barnes v. Union Mut. F. Ins. Co.*, 51 Maine, 110. In general, consent to the transfer of the policy is consent to a transfer of the property. *Small v. Westchester F. Ins. Co.*, 51 Fed. Rep. 789; see *Brennan v. Crouch*, 125 N. Y. 763. A contract of sale which passes the equitable title and

§ 280. **Change amongst Joint Owners.** — On the other hand, there are numerous and respectable authorities not only that a dissolution of the partnership and a division of the property amongst the copartners is a "transfer or change of title," within the meaning of a provision making the policy void on such transfer or change,¹ but also that a sale by one partner to his copartners of his interest, and withdrawal from the firm, is an alienation.² And so it has been held, that a sale by one tenant to his co-tenant is an alienation;³ [and also that it is not;⁴ the alienation contemplated by this policy being held in Connecticut to be a transfer from a party insured to one not insured]. So a division on petition for partition by one co-tenant against another has been held to be a change in the title, though not strictly an alienation.⁵

§ 281. **Change of Ownership; Right of Action.** — And the same difference of opinion prevails as to the proper parties to the action in the respective cases. By some of the authorities it is held that, in case of the sale and transfer by one partner to his copartners of his interest, and his retirement from the firm, an action cannot be maintained in the name of the joint insurers, since it cannot be truly alleged that all the parties were interested at the time of the loss, and, of course, there being no joint property there could be no joint loss.⁶ The prudent course in cases where

¹ *Dreher v. Etna Ins. Co.*, 18 Mo. (3 Bennett) 128.

² *Dix v. Mercantile Ins. Co.*, 22 Ill. 272; *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 523; *Hartford Fire Ins. Co. v. Ross*, 23 Ind. 179; *Finley v. Lycoming County Mut. Ins. Co.*, 30 Pa. St. 311; *Portsmouth Ins. Co. v. Brinckley (Va.)*, 2 Ins. L. J. 843. We do not find this case in the Virginia Reports. [*Hathaway v. State Ins. Co.*, 64 Iowa, 229; *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 550, 564. An indorsement on the policy by the company with knowledge "payable to C.," waives the forfeiture. *Id.*, 565.]

³ *Buckley v. Garrett et al.*, 47 Pa. St. 280.

⁴ [*Lockwood v. Middlesex Mut. Ass. Co.*, 47 Conn. 553.]

⁵ *Barnes v. Union Mut. Fire Ins. Co.*, 51 Me. 110.

⁶ *Dix v. Mercantile Ins. Co.*, 22 Ill. 272; *Murdock v. Chenango County Mut. Ins. Co.*, 2 Const. (N. Y.) 210; *Howard et al. v. Albany Ins. Co.*, 3 Denio (N. Y.), 301; *Bronson, J.*, dissenting.

beneficial interest is a violation of the policy provision making it void if the property be sold or transferred, or any change take place in title or possession. *Cottingham v. Fireman's Fund Ins. Co.*, 90 Ky. 439.

the title to the property has been so changed is to assign the policy and obtain the assent of the insurers to the assignment, when, upon all the authorities, the remaining owner or owners may sue in their own names.

It is, however, elsewhere held that the action must be joint, and that if the sale or transfer, as of one partner of his interest to the other, is without the consent of the insurers, the plaintiff will recover only the value of his interest; while, if it is with their consent, he will recover to the same extent as if there had been no transfer.¹ And in still another case it was held, that where the surviving partner, by one of the articles of copartnership, became sole owner on the death of his copartner, he might recover in his own name for the loss of the goods formerly the property of the firm, destroyed by fire, though the insurers were ignorant of the agreement.² And where a sole trader sells an undivided interest in the insured property to another, who thereby becomes a partner, the insurers assenting to the transfer, and that the policy should remain good to the new firm, and making the alienee a member of their company by the entry of his name in their books as such, it has been held, somewhat strictly, perhaps, that no action at law could be maintained by either of the parties severally, or by both jointly, since neither jointly nor severally did they own the property at the time of the insurance and at the time of the loss. But since, under the circumstances, there was no adequate remedy at law, a joint bill in equity to recover the loss was sustained.³

§ 282. **Waiver; Consent.** — But a forfeiture by alienation may be waived by the insurers or their agent; and a consent by the agent, who, after notice of the alienation by the in-

¹ *Hobbs et al. v. Memphis Ins. Co.*, 1 Sneed (Tenn.), 444. In this case the court say, referring to the New York cases in the 2d of Comstock and the 3d of Denio, before cited, that they have carefully considered them, and do not concur in the doctrine thereof, nor consider it founded in principle or authority. s. c. 3 Ben. Fire Ins. Cas. 37, and note, 49.

² *Wood v. Rutland & Addison Mut. Fire Ins. Co.*, 31 Vt. 552. And see also *Baltimore Fire Ins. Co. v. McGowan*, 16 Md. 47.

³ *Bodle et al. v. Chenango County Mut. Ins. Co.*, 2 Comst. (N. Y.) 53. But see *Foster et al. v. Equitable Mut. Fire Ins. Co.*, 2 Gray (Mass.), 416.

sured, forwards the policy to his principals for their approval, that the policy shall remain good till the assent of the insurers to the assignment can be procured, is such waiver.¹ An assent to a sale generally is an assent to all the terms of the sale, and covers a mortgage back to secure the purchase-money;² but a consent to the assignment of the policy, indorsed thereon after a sale, is not necessarily a consent to a mortgage back to secure the purchase-money.³ And consent to the last of several conveyances is a waiver of forfeiture by reason of either.⁴

[282 A. But consent to one alienation does not waive a *subsequent* transfer.⁵ In general assent of the agent is a waiver.⁶ If, however, alienation is to avoid the policy unless the consent of the company is indorsed thereon, mere notice to the company of the transfer is not sufficient, nor is the company bound to express its disapproval.⁷ *Contra*, in Texas. If the agent knows of a transfer and assents to it, the company is estopped to set up the provision as to indorsement of transfers.⁸ Payment of a dividend to a partner after knowledge that the firm insured has dissolved and the property transferred to the said partner, is a waiver of objection on such ground.⁹ A transfer is ratified or waived by consenting to a corresponding assignment of the policy, and failure of the company for a year after notice to make objection to the act of the agent in assenting to such an assignment was a ratification of his action.¹⁰ Though a policy is to be void by levy of execution on the property, yet if the company with knowledge of such levy and sale consent to an

¹ Illinois Mut. Fire Ins. Co. v. Stanton, 57 Ill. 354. And see also, *post*, chapter on Waiver and Estoppel, § 555.

² Farmers' Ins. Co. v. Ashton, 31 Ohio St. 477.

³ German Nat. Bank v. Agricultural Ins. Co., St. Louis Ct. of App. 9 Ins. Law J. 556.

⁴ Gilliat v. Pawtucket Mut. Fire Ins. Co., 8 R. I. 282. As to notice, see *post*, § 368.

⁵ [Moulthrop v. Farmers' Mut. Fire Ins. Co., 52 Vt. 123.]

⁶ [Fire Ins. Co. v. Building Ass., 43 N. J. 652.]

⁷ [Girard Fire & Mar. Ins. Co. v. Hebard, 95 Pa. St. 45.]

⁸ [Fire Ins. Ass. v. Miller, 2 Tex. Civ. Cas. 333.]

⁹ [Combs v. Shrewsbury Ins. Co., 34 N. J. Eq. 403, 412.]

¹⁰ [Benninghoff v. Agricultural Ins. Co., 93 N. Y. 495.]

assignment of the policy to the purchaser, a new contract is thereby made unaffected by the forfeiture.¹ But an indorsement on the policy "payable in case of loss to A." and an indorsement of consent thereto by the company, do not imply a knowledge or a consent to a *sale* of the goods insured.² Knowledge of the facts and the purpose of the indorsement may, however, be shown. Oral evidence is admissible to show that the plaintiff informed the company (after issue of a policy conditioned to be void upon conveyance) that there had been a conveyance of the property, at the same time telling them of an outstanding mortgage and requesting them to cure the defect, and that they indorsed on the policy an assent to an order of the plaintiff for the payment of the policy to a third party in case of loss.³ A sale of the land under the insured buildings will not avoid a policy where the agent has full knowledge of it and makes indorsements on the policy in reference to it.⁴

[§ 282 B. **Agent's Knowledge.** — The commencement of foreclosure proceedings will not avoid the policy, although it so declares, where the agent of the company knew of the existence of an overdue mortgage, and omitted accidentally the clause making the insurance payable to the mortgagee, the insured being ignorant of English and relying on the agent.⁵ In an action on a policy parol evidence that the insured told the agent about an intended transfer of the property, and the agent said the policy could be so drawn as to cover it, is inadmissible to vary the policy from its actual terms. The suit should be for reformation.⁶]

¹ [Steen v. Niagara Fire Ins. Co., 89 N. Y. 315.]

² [Bates v. Equitable Ins. Co., 10 Wall. 33, 37.]

³ [Oakes v. Manufacturers' Ins. Co., 135 Mass. 248.]

⁴ [Bonenfant v. Insurance Co., 76 Mich. 653.]

⁵ [Butz v. Farmers' Ins. Co., 76 Mich. 263.]

⁶ [Walton v. Agricultural Ins. Co., 116 N. Y. 317.]

APPENDIX.

The following "abstract of decisions upon alienation clauses in insurance policies" will be found of great use to the profession. It is the work of Augustus Russ, Esq., of the Boston bar, to whose courtesy and that of the publishers of the "Insurance Law Journal" we are indebted for the privilege of inserting it here.

ABSTRACT OF DECISIONS UPON ALIENATION CLAUSES IN INSURANCE POLICIES.

1. "Shall be alienated." *Rollins v. Columbia Ins. Co.*, 5 Fost. (N. H.) 200 (1852); 3 Fire Ins. Cas. 393.

2. "Alienated (or aliened) by sale or otherwise." *Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. 44 (1835), 1 Fire Ins. Cas. 482; *Jackson v. Mass. Mut. Fire Ins. Co.*, 23 Pick. (Mass.) 418 (1839), 1 Fire Ins. Cas. 764; *Neely v. Onondago Mut. Fire Ins. Cas.* 7 Hill (N. Y.), 49 (1844) 2 Fire Ins. Cas. 344; *McCulloch v. Indiana Mut. Fire Ins. Co.*, 8 Blackf. (Ind.) 50 (1846), 2 Fire Ins. Cas. 475; *Tillimon v. Vermont Mut. Fire Ins. Co.*, 20 Vt. 546 (1848), 2 Fire Ins. Cas. 683; *Adams v. Rockingham Mut. Fire Ins. Co.*, 29 Me. 292 (1849), 3 Fire Ins. Cas. 30; *Tillon v. Kingston Mut. Ins. Co.*, 5 N. Y. 405 (1851), 3 Fire Ins. Cas. 238; *Burbank v. Rockingham Mut. Fire Ins. Co.*, 4 Fost. (N. H.) 550 (1852), 3 Fire Ins. Cas. 367; *Rice v. Tower*, 1 Gray (Mass.) 426 (1854), 3 Fire Ins. Cas. 725; *Finley v. Lycoming Mut. Fire Ins. Co.*, 30 Pa. St. 311 (1858), 4 Fire Ins. Cas. 330; *Hoxie v. Providence Mut. Fire Ins. Co.*, 6 R. I. 517 (1860), 4 Fire Ins. Cas. 484; *Buckley v. Gannett*, 47 Pa. St. 204 (1864), 4 Fire Ins. Cas. 793; *Cowan v. Iowa St. Ins. Co.*, 40 Iowa, 551 (1876), 5 Fire Ins. Cas. 766; *Lawrence v. Holyoke Ins. Co.*, 11 Allen (Mass.), 387 (1865), 5 Fire Ins. Cas. 65; *Hill v. Cumberland Valley Mut. Protection Co.*, 59 Pa. St. 474 (1868); *Miner v. Judson*, 5 T. & C. (N. Y.) 46 (1874); *Masters v. Madison City Mut. Ins. Co.*, 11 Barb. (N. Y.) 624 (1852), 3 Fire Ins. Cas. 398; *Farmers' Mut. Ins. Co. v. Gray Bill*, 74 Pa. St. 17 (1873), 5 Fire Ins. Cas. 527; *Folsom v. Belknap City Fire Ins. Co.*, 10 Fost. (N. H.), 231 (1855); *Burger v. Farmers' Mut. Ins. Co.*, 71 Pa. St. 422 (1872), 5 Ins. Cas. 454; *Conover v. Mut. Ins. Co. of Albany*, 1 N. Y. 290 (1848), 2 Fire Ins. Cas. 677.

3. "Alienated the property in whole or in part." *Tomlinson v. Monmouth Mut. Fire Ins. Co.*, 47 Me. 232 (1859), 4 Fire Ins. Cas. 447; *Smith v. Monmouth Mut. Fire Ins. Co.*, 50 Me. 96 (1863), 4 Fire Ins. Cas. 723.

4. "Alienated by sale, mortgage, or otherwise." *Shephard v. Union Mut. Fire Ins. Co.*, 38 N. H. 232 (1859), 4 Fire Ins. Cas. 408; *New Hampshire Savings Bank v. Union Mut. Fire Ins. Co.*, 38 N. H. 232 (1859), 4 Fire Ins. Cas. 408.

5. "Alienated by sale, assignment, or otherwise." *Campbell v. Hamilton Ins. Co.*, 51 Me. 69 (1863), 4 Fire Ins. Cas. 723.

6. "In case of any sale, alienation, transfer, or change of title." *Van Dusen v. Charter Oak Ins. Co.*, 1 Robt. (N. Y.) 55 (1863), 4 Fire Ins. Cas. 694.

7. "Shall be alienated by death, sale, or any other means." *Stetson v. Mass. Mut. Fire Ins. Co.*, 4 Mass. 330 (1808), 1 Fire Ins. Cas. 81.

8. "Shall have sold or alienated the property in whole or in part." *Abbott v. Hampden Mut. Fire Ins. Co.*, 30 Me. 414 (1849), 3 Fire Ins. Cas. 86.

9. "Shall be taken possession of by a mortgagee or in any way alienated." *Young v. Eagle Fire Ins. Co.*, 14 Gray (Mass.), 150 (1859), 4 Fire Ins. Cas. 417.

10. "When any property . . . shall in any way be alienated." *Clark v. N. E. Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 342 (1850), 3 Fire Ins. Cas. 131.

11. "The alienation in any way of any property insured." *Dadmun Manufacturing Co. v. Worcester Mut. Ins. Co.*, 11 Md. 429 (1846), 2 Fire Ins. Cas. 488; *Wilson v. Trumbull Mut. Fire Ins. Co.*, 19 Pa. St. 372 (1852), 3 Fire Ins. Cas. 496.

12. "Any alienation or sale of the property." *Mount Vernon Manufacturing Co. v. Summit City Mut. Fire Ins. Co.*, 10 Ohio St. 347 (1859), 4 Fire Ins. Cas. 432.

13. "Shall alienate or sell any house or building insured." *Trumbull v. Portage City Mut. Ins. Co.*, 12 Ohio 305 (1843), 2 Fire Ins. Cas. 289.

14. "If the title to the property, or any part thereof, shall be alienated." *Davis v. Quincy Mut. Fire Ins. Co.*, 10 Allen (Mass.), 113 (1865), 5 Fire Ins. Cas. 35.

15. "Alienation" with the words "the commencement of foreclosure proceedings or the levy of an execution shall be deemed an alienation of the property." *Colt v. Phoenix Fire Ins. Co.*, 54 N. Y. 595 (1874), 5 Fire Ins. Cas. 537.

16. "In case of any sale, alienation, transfer, conveyance, or any change of title in the property insured by this company or of any interest therein, . . . and an entry for foreclosure of mortgage, or the levy of an execution, or an assignment for the benefit of creditors, shall be deemed an alienation of the property." *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53 (1869), 5 Fire Ins. Cas. 248.

17. "All alienations and alterations in the ownership, situation, or state of the property insured in any material particular shall make void any policy covering such property." *Edmunds v. Mut. Safety Fire Ins. Co.*, 1 Allen, 311 (1861), 4 Fire Ins. Cas. 540.

18. "Sale." *Norcross v. Insurance Companies* (Franklin Fire Ins. Co., Spring Garden Fire Ins. Co.), 17 Pa. St. 429 (1851).

19. "Sold or conveyed." *Buchanan v. Exchange Fire Ins. Co.*, 61 N. Y. 36 (1874), 5 Fire Ins. Cas. 591; *Bates v. Equitable Ins. Co.*, 10 Wall. 33 (1869), 5 Fire Ins. Cas. 274; *Bates v. Equitable Ins. Co.*, 3 Cliff. 215 (1868); *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 523 (1863), 4 Fire Ins. Cas. 653; *Washington Ins. Co. v. Kelly*, 32 Md. 421 (1870); *Hoffman v. Aetna Ins. Co.*, 1 Robt. (N. Y.) 501 (1863); *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405 (1865), 5 Fire Ins. Cas. 60; *Heaton v. Manhattan Fire Ins. Co.*, 7 R. I. 502 (1863), 4 Fire Ins. Cas. 699; *Washington Ins. Co. v. Hayes*, 17 Ohio St. 432 (1867), 5 Fire Ins. Cas. 139.

20. "Sell, convey, or assign the subject insured." *Fayette City Mut. Ins. Co. v. Neel*, 19 Albany L. J. (Pa.) 75 (1878).

21. "Sold or conveyed in whole or in part." *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40 (1830), 1 Fire Ins. Cas. 326; *Loring v. Manufacturers' Ins. Co.*, 8 Gray (Mass.), 28 (1857), 4 Fire Ins. Cas. 172; *Hazard v. Franklin Mut. Fire Ins. Co.*, 7 R. I. 429 (1863), 4 Fire Ins. Cas. 656.

22. "Sold or conveyed or the interest of the parties therein changed." *Bur-*

nett v. Eufaula Home Ins. Co., 46 Ala. 11 (1871), 5 Fire Ins. Cas. 362; Ayers v. Home Ins. Co., 21 Iowa, 185 (1866), 5 Fire Ins. Cas. 94; Germond v. Home Ins. Co., 2 Hun (N. Y.), 540 (1874); Germond v. Home Ins. Co., 5 T. & C. (N. Y.) 120 (1874).

23. "Shall be sold, assigned, transferred, or pledged." *Atherton v. Phoenix Ins. Co.*, 109 Mass. 32 (1871).

24. "Sale, transfer, or change of title." *O'Neil v. Hampden Fire Ins. Co.*, 13 Gray (Mass.), 431 (1859), 4 Fire Ins. Cas. 415; *Western Ins. Co. v. Ricker*, 10 Mich. 279 (1862), 4 Fire Ins. Cas. 604; *Home Fire Ins. Co. of Chicago v. Hausline*, 60 Ill. 521 (1871), 5 Fire Ins. Cas. 373; *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176 (1864), 4 Fire Ins. Cas. 776.

25. "When the title of any property shall be changed by sale, mortgage, or otherwise." *Barnes v. Union Mut. Fire Ins. Co.*, 51 Me. 110 (1863), 4 Fire Ins. Cas. 728.

26. "Transfer by sale or otherwise." *Texas B. & Ins. Co. v. Cohen*, 47 Tex. 406 (1877); *Dernani v. Home Ins. Co. of New Orleans*, 26 La. Ann. 69 (1874), 5 Fire Ins. Cas. 534.

27. "In case of any transfer or termination of the interest of the assured by sale or otherwise." *Smith v. Saratoga Mut. Fire Ins. Co.*, 1 Hill (N. Y.), 497 (1841), 2 Fire Ins. Cas. 94; *Smith v. Saratoga Mut. Fire Ins. Co.*, 3 Hill (N. Y.), 508, 2 Fire Ins. Cas. 94; *Power v. Ocean Ins. Co.*, 19 La. 28 (1841), 2 Fire Ins. Cas. 81; *Shotwell v. Jefferson*, 5 Bosw. (N. Y.) 247 (1859), 4 Fire Ins. Cas. 409; *Hooper v. Hudson Fire Ins. Co.*, 17 N. Y. 424 (1858), 4 Fire Ins. Cas. 266; *Phelps v. Gebhard Fire Ins. Co.*, 9 Bosw. 404 (1862), 4 Fire Ins. Cas. 624; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9 (1862), 4 Fire Ins. Cas. 628; *Grovenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391 (1858), 4 Fire Ins. Cas. 254; *Hitchcock v. N. W. Ins. Co.*, 26 N. Y. 68 (1862), 5 Fire Ins. Cas. 488, note.

28. "In case of any sale, transfer, or change of title in the property insured or of any interest therein or possession by another of the subject insured." *Lappen v. Charter Oak Fire & Mar. Ins. Co.*, 58 Barb. (N. Y.) 325 (1870), 5 Fire Ins. Cas. 328.

29. "If the property shall be sold, or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance." *Perry v. Lorillard Fire Ins. Co.*, 61 N. Y. 214 (1874), 5 Fire Ins. Cas. 597; *Savage v. Howard Ins. Co.*, *Savage v. Long Island Ins. Co.*, 52 N. Y. 502 (1873), 5 Fire Ins. Cas. 484; *Miner v. Phoenix Ins. Co.*, 27 Wis. 693 (1871), 5 Fire Ins. Cas. 350; *Sherman v. Niagara Ins. Co.*, 2 Sweeney (N. Y.), 470 (1870), 5 Fire Ins. Cas. 384; *Sherman v. Niagara Ins. Co.*, 40 Howard Practice (N. Y.), 393 (1870), 5 Fire Ins. Cas. 384; *Sherman v. Niagara Ins. Co.*, 46 N. Y. 526 (1871), 5 Fire Ins. Cas. 384; *Keeney v. Home Ins. Co. of Columbus*, 3 T. & C. (N. Y.) 473 (1874), 5 Fire Ins. Cas. 555; *Keeney v. Home Ins. Co. of Columbus*, 7 Ins. L. J. 108, Court of Appeals, N. Y. (1877); *Browning v. Home Ins. Co. of Columbus*, 7 Ins. L. J. 428, Court of Appeals, N. Y. (1877); *Langdon v. Minn. Mut. Fire Ins. Co.*, 22 Minn. 193 (1875); *Germania Fire Ins. Co. v. Thompson*, 7 Ins. L. J. 13, U. S. S. C. (1877); *Germania Fire Ins. Co. v. Thompson*, 16 Albany L. J. 477, 6 Central L. J. 134; *Loy v. Home Ins. Co. of Columbus*, 2 N. W. Rep. (Minn.) 83 (1878); *Loy v. Home Ins. Co. of Columbus*, 7 C. L. J. 274, and 6 Rep. 587; *Brunswick Savings Institution v. Commercial Ins. Co.*, 18 Albany L. J. (Me.) 460 (1878); *Brunswick Savings Institution v. Commercial Ins. Co.*, 19 Albany L. J. 181; *Appleton Iron Co. v. Brit. Am. Ass. Co.*, 19 Albany L. J. (Wis.) 215 (1879).

30. "If any change took place in the title or possession of the property,

whether by sale, lease, legal process, judicial decree, or voluntary transfer." *McEwan v. Fraser*, 1 Mich. (N. P.) 118 (1869).

31. "In case any change takes place in the title or possession of the property, whether by sale, legal process, judicial decree, voluntary transfer or conveyance." *Batchelder v. People's Fire Ins. Co.*, 40 Conn. 56 (1873), 5 Fire Ins. Cas. 482.

32. "In case of any assignment, transfer, or termination of the interest of the insured or of any such claim by sale or otherwise." *Day v. Poughkeepsie Mut. Ins. Co.*, 23 Barb. 623 (1857), 4 Fire Ins. Cas. 181.

33. "In case of any sale, transfer, or change of title in the property hereby insured, or of any part of it, or of any incumbrance or change of interest in any wise of the assured, or the foreclosure of a mortgage or levy of an execution, or possession by another of the subject insured." *Pratt v. New York Central Ins. Co.*, 55 N. Y. 505 (1874), 5 Fire Ins. Cas. 537.

34. "In case of any sale, transfer, or change of title in property insured by this company or of any (undivided) (individual) interest therein, . . . and the entry of a foreclosure of a mortgage or the levy of an execution, shall be deemed an alienation." *Ayres v. Hartford Ins. Co.*, 21 Iowa, 193 (1866), 5 Fire Ins. Cas. 94; *Ayres v. Hartford Ins. Co.*, 17 Iowa, 176 (1864), 4 Fire Ins. Cas. 776; *Hartford Ins. Co. v. Ross*, 23 Ind. 179 (1864).

35. "Where property (insured by this policy) or any part thereof shall be alienated or, in case of any transfer or change of title to the property insured, or any part thereof, or of any interest therein, . . . or if the property insured shall be levied upon, or taken into possession or custody on any legal process, or the title to or possession be disputed in any proceeding at law or in equity, this policy shall cease." *Sossaman v. Pamlico B. & Ins. Co.*, 7 Ins. L. J. 398 (N. C.), (1878).

36. "If the assured shall transfer." *Walker v. Firemen's Ins. Co.*, 2 Handy (Ohio), 256 (1856).

37. "If the title to the property is transferred or changed." *McIntire v. Norwich Fire Ins. Co.*, 102 Mass. 230 (1869), Fire Ins. Cas. 251; *Starkweather v. Cleveland Ins. Co.*, 2 Abb. (U. S.) 67 (1870), 5 Fire Ins. Cas. 328; *Geo. Home Ins. Co. v. Kinnear*, 28 Gratt. (Va.) 88 (1876).

38. "In case of any transfer or change of title in the property insured." *Dreher v. Aetna Ins. Co.*, 18 Mo. 128 (1853), 3 Fire Ins. Cas. 514; *Dix v. Mercantile Ins. Co.*, 22 Ill. 272 (1859), 4 Fire Ins. Cas. 380; *Dix v. Chicago City Ins. Co.*, 22 Ill. 272 (1859), 4 Fire Ins. Cas. 380.

39. "A transfer or change of interest." *Bates v. Commercial Ins. Co.*, 2 Cin. (Ohio) 195 (1872).

40. "In case of any transfer, partial transfer, or change of title in the property insured." *West Branch Ins. Co. v. Helfinstein*, 40 Pa. St. 289 (1861), 4 Fire Ins. Cas. 565.

41. "If any change takes place in the title or possession." *Amazon Ins. Co. v. Wall*, 17 Albany L. J. (Ohio) 489 (1878).

42. "In case of any change of title in the property hereby insured." *Knetts v. Massasoit Ins. Co.*, 56 Barb. 177 (1867), 5 Fire Ins. Cas. 488, note; *Springfield Fire & Mar. Co. v. Allen*, 43 N. Y. 389 (1871).

43. "Any change of interest in whole or in part." *Fernandez v. Great Western Ins. Co.*, 3 Robt. (N. Y.) 457 (1865).

44. "If any change should occur affecting the title, condition, or occupancy of the property, whereby the risk will be increased." *Residence Fire Ins. Co. v. Hannanold*, 37 Mich. 103 (1877).

45. "If the property was levied on or taken in custody by the law." *Mills v. Ins. Co.*, 5 Phila. 28 (1862), 4 Fire Ins. Cas. 653.

46. "The insurance shall cease from the time that the property hereby insured shall be levied on or taken into custody under an execution or other proceeding at law or equity." *Philadelphia Fire & Life Ins. Co. v. Mills*, 44 Pa. St. 241 (1863), 4 Fire Ins. Cas. 730.

47. "This policy ceases to be in force as to any property hereby insured which shall pass from the insured to any other person otherwise than by will or operation of law." *Forbes v. Border Counties Fire Office*, Cases in the Court of Sessions, 3d series, vol. xi. 278 (1873), 5 Fire Ins. Cas. 460.

48. "If said property shall be sold or conveyed, or the interest of the parties therein be changed in any manner, whether by act of the parties or by operation of law, or the property shall become incumbered by mortgage, judgment, or otherwise." *Sherwood v. Agricultural Ins. Co.*, 7 Ins. L. J. 520, Court of Appeals, N. Y. (1878); *Sherwood v. Agricultural Ins. Co.*, 17 Albany L. J. 433, 6 Rep. 213.

49. "In case of any transfer or termination of the interest of the insured, or any part of his interest in the property hereby insured, either by sale, contract, or otherwise, or in case any mortgage, lien, or incumbrance, shall be executed thereon, or shall attach thereto, or if the title thereto shall be in any way changed or affected after the date of this policy, or if any proceedings for sale thereof shall be had, commenced, or taken, or if the title thereto shall be or become less than an absolute and perfect one." *Michigan State Ins. Co. v. Lewis*, 30 Mich. 41 (1874), 5 Fire Ins. Cas. 559.

50. "The insurance under this policy shall cease at and from the time the property hereby insured shall be levied on or taken into possession or custody under any proceeding in law or equity, and should there, during the life of this policy, an incumbrance fall or be executed upon the property insured sufficient to reduce the real interest of the insured in the same to a sum only equal to or below the amount insured." *Smith v. Farmers' & Mechanics' Mut. Fire Ins. Co.*, 8 Ins. L. J. (Pa.) 828 (1879).

CHAPTER XIII.

TITLE AND INCUMBRANCE.

ANALYSIS.

1. TITLE.

“Property” means the *thing* insured; “title,” the right to or interest in it, § 283.

the title is no part of the description of the property, or its condition, situation, value, or risk, § 283.

Unless inquiry is made the title need not be stated; it being sufficient if in fact the assured has an insurable interest, §§ 284, 285.

and where such is the case, there is a strong tendency to hold the company if the assured’s representations can be made to fit the facts either substantially or literally, § 284. no misrepresentation that does not diminish the risk will be fatal, § 287, n.

it is sufficient if the title is actually good, though it appears defective on the records, § 285, n.

Where no inquiry is made calling the property “his” or himself the “owner” is right, if in any substantial sense it is his, although (§ 285) —

it is on the land of another, § 285.

or attached, § 285.

or he is only tenant for life, § 285.

or for years, § 235.

or joint owner, § 285.

or vendee with deed passed to third person for him, § 285.

or possessor under a contract of purchase, §§ 285, 287 (even though parol).

or holder of a claim enforceable in equity, § 285, and notes.

it is not misrepresentation for the equitable owner to claim full title, § 285, n.

or vendor before delivery, § 285.

or judgment creditor to whom the property has been set off subject to mortgage, § 287.

or purchaser at foreclosure or sheriff’s sale before deed acknowledged or passed, § 287.

or grantor with defeasance back unrecorded, § 285, n.

or mortgagor *before* redemption expires, § 285, n.; otherwise *after*.

whether holder of title-bond from one who was suing in equity to perfect his title, is owner, for the jury to decide, § 284.

a sheriff's sale before insurance and annulled afterwards does not affect the ownership, § 285.

Particular interest need not be stated; the insurance may be general, and recovery according to the interest proved, § 285, n.

except in reinsurance, bottomry, and freight, profits, &c., in some cases, § 285, n.

If the "*true title*" is called for it must be stated with substantial accuracy, § 287.

it will not do to call the property "*his*" when he is only a tenant by curtesy, §§ 287, 289.

part owner, § 287.

stockholder, § 287.

mortgagee, § 287.

mortgagor, § 287.

if the charter requires statement of title if less than a fee-simple, an omission to state title is a warranty of a fee-simple, § 287.

individual may insure his property under his trade name though it makes the insurer think it is corporate property, § 287.

"good and perfect unincumbered title," mortgage paid but not discharged of record is a breach, § 289.

Fee-simple, "if title less than, it must be stated," § 289.

verbal gift cannot create, and though deed made and delivered before loss, policy void, § 289.

mortgagee under absolute deed may so state his title, § 289, end.
fee of undivided portion of land under buildings not sufficient, § 289.

husband cannot call wife's property "his" when charter requires fee-simple, § 289.

see, where agent knows the facts, § 294 E.

warranty of fee-simple true if he can enforce specific performance of a bond to convey, § 289.

if several persons are insured in respect to the same property, the condition applies to the *sum* of their interests, § 289.

"Sole and unconditional owner:"

mortgagor of chattels is, § 286.

"Entire, unconditional, and sole owner:"

valid condition, § 287 A.

breach fatal, § 287 A.

so is failure to disclose true title if not as required by policy, though no question asked at time of application, § 287 A.

mortgagor in possession in some States is, § 287.

in general mortgage must be stated, § 287.

contra, § 287 C, even as to absolute deed intended as a mortgage.

vendee though giving mortgage for price, § 287 C.

or allowing the vendor to retain the legal title as security, § 287 C.

a lien does not affect, § 287 C.
 nor a conditional sale, § 287 C.
 nor an agreement to give clerk a share of profits, § 287 C.
 nor a dry legal title in another, § 287 C.
 sole beneficial right sufficient, § 287 C.
 equitable owner is, in respect to insurance, § 287 C.
 one in possession under a valid contract of purchase is,
 § 287 C.

though he has assigned his contract as collateral, § 287 C.
 but mere verbal promises to convey are not sufficient, § 287 C.
 if the description says "held in trust" or otherwise, the com-
 pany has notice, the condition does not apply, § 287 C.

Not entire, unconditional, and sole owner.

if there is any outstanding right, legal or equitable, § 287.
 as tax-title, &c., § 287, end.

stockholder as to corporate property though pledged to him,
 § 287, n.

holder under quitclaim from second mortgagee, § 287 B.
 leasehold and contract of purchase of personalty, price unpaid,
 § 287 B.

surviving partner, § 287 B.

life tenant, § 287 B.

Leasehold interest. Absolute interest:

interest and title are not synonymous.

if the loss would fall on A, his interest is absolute, § 288.

possessor under contract of purchase with part payment, § 288
 (absolute)? § 288.

pledgor, § 288.

lessee owning building to be left on land at end of lease, not
 leasehold, § 288.

mechanics' lien, § 288.

not stating leasehold when required by policy, fatal, though
 no question asked at application, § 288.

2. INCUMBRANCE.

The object of inquiring about incumbrances is to aid in determin-
 ing the motive of the assured to preserve the property, and
 in case of mutual companies to know the value of their lien
 for premiums, § 290.

The same thing may be an incumbrance or not according to cir-
 cumstances and the disposition of the court, §§ 291-294.

and the language of the policy may make it void, only for
 burdens put on the property by consent of the assured,
 §§ 292, end, 292 A (as where the condition runs against
 incumbrances "without consent of the company," for
 the assured could not get assent for a lien put on by
 some one else, perhaps without his knowledge, § 292).

or it may be void for any burden though placed by the law,
 and even unknown to the assured, § 291 A.

an "incumbrance on the property" means on the whole prop-
 erty insured, and an incumbrance on part of it will not
 be fatal, § 291 (strict construction).

What is an incumbrance, §§ 291, 291 A.

What is not, §§ 292, 292 A.

assessment of deposit note (?), §§ 291, 292.

attachment may be, § 291.

bond for support not, § 292; *contra*, § 292, n.

nor bond to convey where the time named has passed, § 292.

curtesy, if contingent, not, § 292.

power, if contingent, not, § 292.

judgment, see lien.

lease for years not, § 292 A.

lien may be, § 291; or not, §§ 292, 292 A.

for taxes may be, § 291; or not, § 292 A.

not, if assessment is illegal, § 292 A.

for purchase-money may be, § 291; or not, § 292.

of a judgment may be, § 291, 291 A; or not, § 292.

not if paid though undischarged of record,
§ 291, n.

by collateral deposit of deeds, § 291.

mechanics' lien may be, § 291.

mortgage is, §§ 291, 292 B.

though fraudulent and unrecorded, § 291.

so partner's mortgage to outsider, § 291 A.

but not if paid, though undischarged of record, § 292.

the presumption is that a mortgage is not paid, § 294.

nor if barred by statute of limitations, § 292.

house on blocks held encumbered by mortgage on land,
§ 294 F.

sale on execution is, § 291.

seizure on execution is, § 291.

but not levy of goods left with debtor, § 291 n.

tax title that is a constructive trust not, § 292.

Misrepresentation or concealment of an incumbrance will be fatal when the application questions, or the policy or the organic law requires disclosure (§ 292 B); a requirement in the by-laws not a part of the policy, and unknown to the assured, would not probably be sufficient (see § 294 a). Where the questions asked are fairly and honestly answered by the assured, a condition as to disclosure in the after coming policy ought not to affect him (see § 292 A; 125 Pa. St.). The company should call for the information they want in the application, not in the policy.

where the assured says there is no incumbrance, which is true, but he *believes* there is, not knowing that a mortgage has been paid, his bad faith avoids the policy (§ 292 B). *The moral hazard is the same as if the mortgage was good.*

materiality for jury, § 292 B.

misstatements as to incumbrances on other *land* not material, § 292 B.

if the representation is substantially true and in good faith, taking into account all the equities and even parol agreements void under the statute of frauds, the policy will be upheld (§ 292 B). A stranger to the agreement cannot raise such a plea.

stating that there is an incumbrance without the amount, sufficient, § 292 B.

omission not fatal if all company's questions are truly answered, § 292 B.

Subsequent incumbrance, § 294.

if paid before loss policy good, § 294.

Paying off old incumbrance and a new one arising, § 294, end.

if the total incumbrance is less than at the time of insurance the policy ought not to be void, unless the express provisions are inconsistent with any other construction, §§ 294, end, and 291 A.

If the policy permits incumbrance only to a certain amount, going beyond it is fatal, § 291 A.

Notice of incumbrance :

must be given if required, § 294 a.

delay of fifty days unreasonable, § 294 a.

indorsement "loss payable to mortgagee," is notice, § 294, a.

putting in mail is *prima facie*, § 294 a.

provision for, in by-laws alone not sufficient, § 294 a.

Waiver (and estoppel) :

of statement of title,

by insurance "as interest may appear," § 294 C.

by soliciting agent, § 294 C.

of condition as to sole ownership,

cannot make policy cover goods of strangers, § 294 C.

of incumbrance,

by indorsing policy payable to mortgagee, § 294 C.

assent to substituted mortgage waives old one, § 294 C.

neglect of agent to ask any question about incumbrance estops company *in case of one ignorant of English* ; signing application agent said was all right, § 294 C ; in general, such neglect is not a waiver of the "sole" &c., condition in the policy, § 294 G.

if answer or omission is *bona fide* made by advice of agent, company estopped to object to it, § 294 b.

if the description is inconsistent with absolute ownership, or shows that required facts are omitted, or in any way the company has notice, issue of a policy is a waiver, §§ 294 D, 294 b.

by adjustment of loss by agent with knowledge of facts, § 294 b.

or neglect to endorse or make proper statement, § 294 b.

knowledge of the agent at the time of insurance or before issue of a policy that there is a lien or mortgage or other incumbrance, or that the insured is not the sole owner, &c., is a waiver, if the assured acted in good faith, although the policy declares there shall be no waiver except in writing, and sole ownership, &c., is warranted, § 294 E.

but otherwise if the assured actually knows of the warranty or erroneous information that goes to the company, § 294 E.

and failure at trial to prove the truth of the facts stated to the agent is fatal, § 294 E.

Contra, it has been held that one signing a document must know its contents, § 294 F.

and if policy says "no waiver by agent" there can be none, § 294 F.

no waiver or estoppel —

by admission of a director or by vote of directors authorizing settlement, if assured has not changed his position in consequence, § 294 G.

by sending adjuster *before company knows facts*, § 294 G.

by a verbal agreement (before policy, but left out of it) to allow insured to mortgage, § 294 G.

§ 283. **Title and Property distinguished.** — Inquiries about a greater or less interest and a more or less perfect title usually refer to the quality of the estate, having reference to its duration, whether an estate in fee, for life, for years, or at will, to what is vested in distinction from what is conditional or contingent, and not to questions of incumbrance as affecting the quantity of the estate.¹ "Title" has respect to that which is the subject of ownership, and is that which is the foundation of ownership, and with a change of title the right of property — the ownership — passes. (a) "Property" is a thing owned, that to which a person has, or may have, a legal title. Both words are inappropriate to describe the insurable interest which exists solely by reason of the personal liability of the insured for the payment of a sum of money charged upon the building or goods insured. When, therefore, the word "property" is used in the clause forbidding alienation, it is used to designate the thing insured, and not the interest of the insured in the thing; and "change or transfer of title" in the property insured is change or transfer of title and ownership of the thing insured.² The title or interest of the assured in the property insured is no part of the description of the property, and need not there-

¹ *Hough v. City Fire Ins. Co.*, 29 Conn. 10; *Woody v. Old Dominion Ins. Co.*, 31 Grat. (Va.), 362.

² *Springfield Fire & Mar. Ins. Co. v. Allen*, 43 N. Y. 389.

(a) The word "interest" has a broader meaning than "title," and includes both legal and equitable rights. *Gibb v. Phila. F. Ins. Co.*, 59 Minn. 267. See *Sun Fire Office v. Clark*, 53 Ohio St. 414.

fore be mentioned in answer to a call for a true description of the property¹ or under a requirement to state the "condition, situation, value, or risk" of the property insured.² (a) And where the insurance is "as interest may appear," the whole question of interest, title, and ownership is an open one, and the insurers cannot, after loss, predicate upon such an uncertain phrase, misrepresentation, or concealment, upon either of the questions so left open.³ In many of the States, misrepresentations as to title and interest, unless fraudulent and material, are now rendered harmless by statute.

So where no condition as to statement of title is contained in the policy, great liberality both of proof and construction will be allowed the applicant to enable him to recover, as that by relations with his partner he is equitably sole owner.⁴

§ 284. **Title.** — In general, unless the title, ownership, or interest in the insured property is required by the conditions of the policy to be specifically, and with particularity and accuracy, set forth, it will be sufficient if the insured has an insurable interest, under any status of ownership or possession. And the fact that the statements in the application are by reference made a part of the contract, and thus become warranties, will have no effect in extending the force or effect of these statements beyond their actual import. Thus, where a married woman had been abandoned by her husband, but, with the family, remained on the homestead, which had been occupied by them before the separation, and with her own earnings made improvements from time to

Franklin Ins. Co. v. Coates, 14 Md. 285.

² Kerr v. Hastings Mut. Fire Ins. Co., 41 U. C. (Q. B.) 217; Kerr v. Gore Dist. Mut. Fire Ins. Co., 1 Ont. App. Rep. 375.

³ Dakin v. Liverpool, &c. Ins. Co., 13 Hun (N. Y.), 122; 8 Ins. L. J. 579; Ramsey v. Phoenix Ins. Co., C. Ct. (N. Y.) 2 Fed. Rep. 429.

⁴ Liverpool, &c. Ins. Co. v. McGuire, 52 Miss. 227. See also Continental Ins. Co. v. Ware (Ky.), 9 Ins. L. J. 519.

(a) If the insured shows that insured chattels belong to him at the date of the fire, or that he then had possession coupled with a *bona fide* claim of right to them, the burden is upon the insurer to show that he was

not their owner when the policy was taken out. Morris v. Imperial Ins. Co., 106 Ga. 461. It is the insurer's duty to make due inquiries when the policy is issued, and not later. Peet v. Dakota F. & M. Ins. Co., 1 So. Dak. 462.

time, it appearing that the husband, on leaving, made a verbal gift of the property to her, it was held that she had an insurable interest. Application was made for insurance upon one dwelling-house and certain personal property therein contained, and to the question whether the title was a warranty deed or a bond, the answer was, "W. D." And to the further question, "Is your property incumbered?" the answer was, "None." These being all the statements in the application touching the title of the insured, it was alleged in defence that there was a breach of warranty, and no proof of ownership in fee, but the court did not take this view.¹ [The courts manifest a strong tendency to hold

¹ The court said, "We fail to find by the application of the meaning attached to words that the insured represented herself as holding any particular kind of title. The words 'one dwelling-house' do not import title of any kind. The letters 'W. D.' have no such meaning; nor has the question, 'Is your property incumbered?' If the letters 'W. D.' mean a warranty deed, it must appear from extrinsic evidence, if that could be received. They have no such fixed and definite meaning in the law, nor in any common use, nor even in the connection in which they are employed. That may be their meaning, but it is not apparent. But if it was conceded that they mean that the insured's title was a warranty deed, still that is not an assertion that such title is a fee. A warranty deed may pass a term of years, a life-estate, a fee, or less estate, or it may pass no estate whatever. It conveys only the estate of the grantee, whatever that may be. If we have none, it can pass none to the grantee. We then look in vain for any assertion in the application as to the kind of title, or the nature of the estate she claimed. It then does not appear from the application that she was required to prove that she held a fee or other absolute estate in the lot and house. Then, under the averment in the declaration, what was she bound to prove? Manifestly that she held and owned an insurable interest, — such a title as if there should be loss it would fall upon, and have to be borne by her. In a declaration on a policy of insurance, the averment that the insured was the owner of the property destroyed must be considered with reference to the contract of insurance. It amounts to an averment that the insured had an insurable interest, and not that he was the absolute owner of the property. When he sues, his right to recover depends upon whether he was the owner of an insurable interest, and not whether he was the absolute owner, and the averment must be so construed. It cannot be construed as it would be in a contract or covenant to convey land, as in such case the thing sold and purchased is the land; and when the vendor says, in his covenant, that he is the owner, and agrees to convey it to another, the law holds that as the parties understood by the covenant that it was the land that was sold, that the assertion of ownership implied that the vendor held the absolute title, and had agreed to convey such a title as would vest in the vendee absolute ownership. Language not having a technical meaning must be construed with reference to the subject to which it is applied. Thus, under either the application for the insurance or the averment in the declaration, the insured was bound only to prove that she held an insurable interest, and all questions be-

the company if the assured has an insurable interest, and in such cases show great ingenuity in making his answers fit the facts, sustaining them if either *substantially or literally* (though *only* literally and not substantially) they can be adjusted to the truth. When the assured in answer to the question "What is your title to or interest in the land?" answered "Deed," she having only an inchoate right of dower, but her husband's title having come by deed, it was held to be no breach of warranty sufficient to work a forfeiture.¹ In answer to the question "What title has the occupant?" he said, "Warranty deed;" "Number of acres?" — "160." He had warranty deeds for the whole, but for 120 acres the deeds were given to him in order that he might sell the land for the owner. The deeds were absolute on their face, there being no mention of the trust; wherefore it was held that his answer was sufficient. If the company wished to know the equities they should have inquired about them.² Where the insured who described the property as "his" had bought a fee simple, and held a title bond from the vendor, whose title was imperfect by reason of a reversionary interest of one-seventh belonging to another, and who was pushing a chancery suit to perfect his title, it was held that the question whether the defect was material should have gone to the jury.³

yond that were immaterial." *Rockford Ins. Co. v. Nelson*, Sup. Ct. Ill. 2 Ins. L. J. 341. In *Catron v. Tennessee Insurance Company*, 6 Humph. (Tenn.) 176, a tenant in common owning one-half, applied for insurance in these words: "I wish a furnace and forge insured," without anything further said, or required to be said, about the title or interest of the insured. And the court held this a misrepresentation as to the interest, which avoided the policy. But neither the cases cited and relied upon by the court, nor any others that we have been able to find, support so extravagant a doctrine. There were other and sufficient grounds for the decision, and it is evident, from an examination of the opinion, that the court were penetrated, if not influenced, by a confident belief that the insured set fire to his own property. And the early cases in the Supreme Court of the United States (*Columbian Ins. Co. v. Lawrence*, 2 Peters, 25; s. c. 10 id. 507; and *Carpenter v. Prov. Wash. Ins. Co.*, 16 id. 495), opposed to the doctrine stated in the text, have not received the approbation of the State courts. *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285. And see § 285.

¹ [*Dacey v. Agricultural Ins. Co.*, 21 Hun, 83, 87.]

² [*Pavey v. American Ins. Co.*, 56 Wis. 221.]

³ [*Williams v. Buffalo German Ins. Co.*, 17 Fed. Rep. 63; 12 Ins. L. J. 374.]

§ 285. **Title; Ownership; Interest.** — The insured is not bound to state the nature or particulars of his title, unless they are inquired about, or required to be disclosed by the provisions of the policy.¹ (a) A statement that he is the owner, that being an indefinite term, or that the property is his, if in fact² it be his in some substantial sense, is sufficient; as where the property insured stands upon the land of another, the buildings belonging to the assured;³ or has

¹ [Trade Ins. Co. v. Barracliff, 45 N. J. 543; Guest v. Fire Insurance Co., 66 Mich. 98; Castner v. Farmers' Mut. Fire Ins. Co., 46 Mich. 15, 18. Under a general policy on goods the assured is not required to state the particular interest or proportion of interest which he intends to have insured. He may recover according to his interest. Whether it be a distinct or an undivided share cannot be material. Lawrence v. Van Horne, 1 Caines, 276, 284. The nature of the interest of the assured need not be specified in the policy except in cases of re-assurance, and insurance by the holder of a bottomry or respondentia bond, and insurance on freight, profits, and commissions; and even these cases will not be exceptions if they may be regarded as the subject-matter of insurance, rather than the interest of the party in the subject-matter. White v. Hudson River Ins. Co., 7 How. Pr. 341, 348.]

² [It is enough if the title is actually good, though apparently defective on the records. Lockwood v. Middlesex Mut. Ass. Co., 47 Conn. 553.]

³ Curry v. Commonwealth Ins. Co., 10 Pick. (Mass.) 535; Fletcher v. Commonwealth Ins. Co., 18 id. 419; Morrison v. Tenn. Mar. & Fire Ins. Co., 18 Mo. 262; Sussex County Mut. Ins. Co. v. Woodruff, 2 Dutch. (N. J.) 541; Hopkins v. Provincial Ins. Co., 18 U. C. (C. P.) 74; Sinclair v. Canadian, &c. Ins. Co., 40 U. C. (Q. B.) 206, 211. [Where the owner of property on which there was insurance, sold the land, retaining the buildings, and took out new insurance on

(a) In general, when there is no fraudulent intent, the assured's neglect to disclose and define incumbrances or his interest, beyond what he is asked about, in the property, does not invalidate the policy. Hall v. Niagara F. Ins. Co., 93 Mich. 184; Cross v. National F. Ins. Co., 132 N. Y. 133; Dooly v. Hanover F. Ins. Co., 16 Wash. 155; Seal v. Farmers' Ins. Co. (Neb.), 80 N. W. 807; Koshland v. Hartford F. Ins. Co., 31 Oregon, 402; Morotock Ins. Co. v. Rodefer, 92 Va. 747; Hart v. Niagara F. Ins. Co., 9 Wash. 620; Knop v. National F. Ins. Co., 101 Mich. 359; German Ins. Inst'n v. Kline, 44 Neb. 395; Queen Ins. Co. v. Kline (Ky.), 25 Ins. L. J. 236. But actual representations made as to incumbrances

in an application for a fire policy are usually treated as warranties. Stevens v. Queen Ins. Co., 81 Wis. 335; Westchester F. Ins. Co. v. Weaver, 70 Md. 536; Cerys v. State Ins. Co., 71 Minn. 338; German-American Ins. Co. v. Hart, 43 Neb. 441; State Ins. Co. v. Gray, 44 Kansas, 731; Morris v. Imperial Ins. Co., 106 Ga. 461.

As to the agent's consent to transfer of title, see St. Onge v. Westchester F. Ins. Co., 80 Fed. Rep. 703; Graham v. American F. Ins. Co., 48 S. C. 195. If the agent knowingly writes in the application false answers as to title when the truth is told, the insurer is liable. Creed v. Sun Fire Office, 101 Ala. 522.

been seized on execution;¹ or the insured is tenant for years;² or there is an outstanding agreement to sell,³ or a parol agreement to purchase, upon which a portion of the purchase-money has been advanced;⁴ or the insured is a joint owner, in which case he may recover to the extent of his interest,⁵ especially if his copartner be only interested in the profits.⁶ The interest of the partner in such a case, who in fact owns the stock of goods, is an absolute equitable interest, and is protected by a policy which is to be void if the interest of the insured be not an absolute one.⁷ So where the insured, in reply to a question, — the policy containing no stipulation as to disclosure of title, — answered that the land on which the insured building stood was hers, when in fact she had only a life-estate therein, but her husband's will had made no disposition of the remainder, and the heirs, during the twelve years which had passed since the probate of the will, had made no claim to the property, it

them without saying anything about the change of title to the land, and being asked no questions about the land title, it was held that there was no concealment. It was the carelessness of the company if it did not make specific inquiries about such a matter. *Washington Mills Manuf. Co. v. Weymouth Ins. Co.*, 135 Mass. 505.]

¹ *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40.

² *Niblo v. North American Ins. Co.*, 1 Sand. (N. Y. Sup. Ct.) 551; *Sauvey v. Isolated Ins. Co.*, U. C. (Q. B.), 16 Can. L. J. 30 (1880). In *Crockford v. Lon. & Liverpool Fire Ins. Co.*, 5 Allen (N. B.), 152, it appeared that the plaintiff, the tenant of a lessee, had an agreement with his landlord for an assignment of the lease, which, however, had, before the insurance was effected, been assigned to another person. It was held that the plaintiff was at most a tenant from year to year, and not an owner in such a sense as the policy contemplated.

³ *Davis v. Quincy Mut. Fire Ins. Co.*, 10 Allen (Mass.), 113; *Dohn v. Farmers' Joint Stock Ins. Co.*, 5 Lans. (N. Y.) 275; *Lorillard Fire Ins. Co. v. McCulloch*, 21 Ohio St. 176; *Laidlaw v. Liverpool, &c. Ins. Co. (U. C.)*, 13 Grant, Ch. 377; *Bonham v. Iowa, &c. Ins. Co.*, 25 Iowa, 328. Where there is an outstanding tax-title in litigation, *quære*. *Hurd v. St. Paul, &c. Ins. Co.*, 39 Mich. 443.

⁴ *Brogden v. Manufacturers', &c. Ins. Co.*, U. C. (C. P.) 15 Can. L. J. 31 (1879).

⁵ *Hartford Prot. Ins. Co. v. Harmer*, 2 Ohio St. 452. And see also *Peck v. New London Mut. Ins. Co.*, 22 Conn. 575.

⁶ *Irving v. Excelsior Fire Ins. Co.*, 1 Bosw. (N. Y. Superior Ct.) 507. [A part-owner may insure his individual interest without specifying that interest. *Turner v. Burrows*, 5 Wend. 541, 546.]

⁷ *Ibid.* And see also *Collins v. Charlestown Mut. Fire Ins. Co.*, 10 Gray (Mass.), 155; *Gould v. York County Mut. Ins. Co.*, 47 Me. 403.

was held that the answer was substantially true.¹ So if the insured is in possession of a house under an executory contract on which part payment has been made, or which can be enforced in equity.² So if the insured be in possession in right of his wife, under a verbal agreement that upon certain conditions — part already executed — he shall have the legal title.³ And a conveyance by the owner to a fictitious person, with a reconveyance in the name of the fictitious person to the owner, leaves the title in the owner.⁴ And he may describe himself as owner who, as *cestui que trust*, can enforce his title in equity.⁵ But a mere promise by a purchaser, at a sale on execution, to reconvey on the payment of the purchase-money, there being no promise on the part of the execution debtor to pay, nor other consideration, will not support a representation that the property is the applicant's.⁶ If the insurer be the owner of an equity of redemption, it is likewise sufficient;⁷ (a) since an equity of

¹ *Allen v. Charlestown Mut. Fire Ins. Co.*, 5 Gray (Mass.), 384.

² *Etna Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385; s. c. 12 Ind. 507; *Franklin Fire Ins. Co. v. Martin* (N. J.) 8 Ins. L. J. 135; *Ramsay v. Phoenix Ins. Co.*, C. Ct. (N. Y.), 2 Fed. Rep. 429; *Dohn v. Farmers' Ins. Co.*, 5 Lans. (N. Y.) 275.

³ *Farmers' Ins. Co. v. Fogleman*, 38 Mich. 481; *Southern Ins. Co. v. Lewis*, 42 Ga. 587.

⁴ *David v. Williamsburgh, &c. Ins. Co.* (N. Y.), 10 Ins. L. J. 150.

⁵ *Newman v. Springfield Ins. Co.*, 17 Minn. 123. [An equitable interest is enough to sustain a recital of ownership. *Guest v. Fire Insurance Co.*, 66 Mich. 98. Such a statement is not a material misrepresentation. *Dohn v. Farmers' Joint Stock Ins. Co.*, 5 Lans. 275, 279. The equitable ownership is equivalent to the fee, for the purposes of insurance, and where the equitable owner represents that the title was in her name, the company will not be allowed to defend on that ground. *Pennsylvania Fire Ins. Co. v. Dougherty*, 102 Pa. St. 568. When *A.* described the insured property as his, when in fact previous to the insurance he had conveyed it to *B.* by a warranty deed, *B.* giving a defeasance deed in return, which latter had not been recorded, the policy was held good. *Walsh v. Philadelphia Fire Ass.*, 127 Mass. 383, 385. In the absence of express inquiry, the interest of the insured as equitable owner upon whom the whole loss must fall, was sufficient.]

⁶ *Mers v. Franklin Ins. Co.*, 68 Mo. 127.

⁷ [A mortgagor on whose property the mortgage had been foreclosed, but the period of redemption had not expired, took out insurance without any written application, or any statement of the condition of his title, and it was held that in the absence of fraud the insurance of the property as his own was valid. It was otherwise with a policy issued after the redemption expired. *Essex Savings Bank v. Meriden Ins. Co.*, 57 Conn. 335.]

(a) See *infra*, § 449, new note.

redemption is a right, and is a real interest in the land, created and secured by the law, to which a lien will attach, so that when the insured states the property in his possession to be his, he sufficiently states the true title, in the absence of specific inquiries.¹ And though the vendor makes out a bill of sale of personal property, and receives a note secured by a mortgage in consideration for the sale, if there be no delivery of the bill of sale, the property will not thereby be divested out of the vendor, so that a warranty that the property is his will be broken.² [Where the property had been deeded to the insured and the deed left with a third person to be delivered to the insured, but was not so delivered till after the fire, it was held that she was the owner.³ A sheriff's sale afterward annulled will not affect the title of the insured, nor his right to claim under a policy obtained by him as owner after such sale of his land and before it was set aside.⁴]

§ 286. **Mortgagor of Personal Property.** — And it is also held that the mortgagor of chattels is the "sole and unconditional owner" of the mortgaged property.⁵

¹ *Buffum v. Bowditch Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 540; *Washington Ins. Co. v. Kelley*, 32 Md. 421; *Kronk v. Birmingham Ins. Co. (Pa.)*, 9 Ins. L. J. 26.

² *Vogel v. People's Mut. Fire Ins. Co.*, 9 Gray (Mass.), 23.

³ [*Mattocks v. Des Moines Ins. Co.*, 74 Iowa, 233.]

⁴ [*Rearman v. Gould*, 42 N. J. Eq. 4.]

⁵ *Hubbard et al. v. Hartford Fire Ins. Co.*, 33 Iowa, 325. But Miller, J., in his dissenting opinion in this case, takes a distinction between mortgages of real and mortgages of personal property, based upon the statute, which, as the statutes of other States may have similar provisions, it may be of importance to note. "Without stopping to inquire," says the learned judge, "into the rights of mortgagors at common law, it is sufficient to show that by our statute, in the absence of stipulations to the contrary, the mortgagor of *real property* retains the legal title and right of possession thereof, *but in the case of personal property, the mortgagee holds that title and right*. Here the statute confers the title and the rights of possession on the mortgagee of chattels, the mortgagor having a naked equity of redemption, a mere right to defeat the title of the mortgagee by a performance of the condition of the mortgage, and on a failure to comply with those conditions the mortgagee becomes the absolute owner. *Bean v. Barney, Scott & Co.*, 10 Iowa, 498. The mortgagor of personal property is so far from having any ownership in the goods covered by the mortgage, that he has no interest therein which can be levied upon and sold under execution; unless *by the terms of the mortgage*, he is entitled to, and in fact retains, the possession. *Campbell v. Leonard*, 11 Iowa, 489; *Rindskoff Bros. & Co. v. Lyman*, 16 id. 260. In what

§ 287. **True Title; Entire, Unconditional, and Sole Ownership.** — If, however, the “true title” is called for, — and this is generally the case in mutual insurance companies, as the lien which they rely upon as security depends upon the title, — a failure to set forth the title with substantial accuracy will amount to a misrepresentation or a concealment, as the case may be:¹ as where the insured describes the property as his when he has only a bond for a deed;² or is a stockholder in a corporation which owns the property;³ or is only a tenant by the curtesy;⁴ or a lessee with or without an agreement for purchase;⁵ or the assignee of a lessee with right to purchase;⁶ or a mortgagee;⁷ or has only an imperfect tax title;⁸ or for the purpose of defrauding his creditors, has conveyed away his estate, without consideration, to another, who promises to reconvey upon request;⁹ or is the owner of only one of seven parcels of the property insured.¹⁰ One who holds as trustee under a will has not an “absolute title.”¹¹ In such case the policy will not cover even that the

sense, then, can it be said that the mortgagor of personal property is ‘considered the owner’? None whatever; much less can it be maintained that he is the ‘sole and unconditional owner.’

¹ [If the policy does not require a statement of title, a misrepresentation will not be fatal that does not diminish the risk or lower the premium, but if the policy require the true title, a failure to state the truth vitiates the contract. *Adema v. Insurance Co.*, 36 La. An. 660.]

² *Smith v. Bowditch Mut. Ins. Co.*, 6 Cush. (Mass.), 448; *Brown v. Williams*, 28 Me. 252; *Falis v. Conway Mut. Fire Ins. Co.*, 7 Allen (Mass.) 46; *Birmingham v. Empire Ins. Co.*, 42 Barb. (N. Y.) 457.

³ *Philips v. Knox County Mut. Ins. Co.*, 20 Ohio, 174; *Abbott v. Shawmut Mut. Fire Ins. Co.*, 3 Allen (Mass.), 213. [The insured is not sole owner of goods belonging to a company of which he is a stockholder, and which are held by him as security for advances to the corporation. *McCormick v. Springfield Fire & Mar. Ins. Co.*, 66 Cal. 361.]

⁴ *Leathers v. Insurance Co.*, 4 Fost. (N. H.) 259; *Eminence Mut. Ins. Co. v. Jesse*, 1 Met. (Ky.) 523.

⁵ *Shaw v. St. Lawrence County Mut. Ins. Co.*, 11 U. C. (Q. B.) 73; *Marshall v. Columbian Mut. Ins. Co.*, 7 Fost. (N. H.) 157.

⁶ *Walroth v. St. Lawrence County Mut. Ins. Co.*, 10 U. C. (Q. B.) 525.

⁷ *Jenkins v. Quincy Mut. Fire Ins. Co.*, 7 Gray (Mass.), 370; *Brown v. Gore Dist. Mut. Ins. Co.*, 10 U. C. (Q. B.) 353.

⁸ *Pinkham v. Morang*, 40 Me. 587.

⁹ *Treadway v. Hamilton Mut. Ins. Co.*, 29 Conn. 68.

¹⁰ *Day v. Charter Oak Fire & Mar. Ins. Co.*, 51 Me. 91.

¹¹ *Murphrey v. Old Dominion Ins. Co.*, C. Ct. (N. C.) 5 Ins. L. J. 297.

title to which is truly represented.¹ [The omission to state the true title amounts to a warranty of such title as the charter of the company requires. The extent of the assured's interest is always considered by the insurers, and if the estate be less than an unincumbered fee simple it should be disclosed.²] *If, however, the policy of a mutual insurance company, whose charter gives a lien upon real estate, does not call specifically for the true title*, no description of the title need be given. A general answer that the property belongs to the insured, or to that effect, is sufficient.³ And in *Clapp v. Union Mutual Insurance Company*,⁴ a judgment creditor, to whom the insured property had been set off on execution, subject to two mortgages to other parties, and to the debtor's unexpired equity of redemption, was held not to have misrepresented his title and interest in stating the property to be his own. In like manner, in *Chase v. Hamilton Mutual Insurance Company*,⁵ the insured, who had been in possession of the land several years *under an executory agreement for the purchase* thereof, and had erected thereon the building insured, and before the application for insurance had paid all the purchase-money, though he had not then taken the legal title, was held to have stated his "true title and interest," in representing the house and land to be his. So where the purchase was at a sale under foreclosure of a mortgage, and the property was destroyed before the deed was passed, it was held that when the deed was passed it took effect as of the day of the sale, and that the insured then had the legal title, subject to an equity of redemption, and truly answered that they were the owners.⁶ [A pur-

¹ *Wilbur v. Bowditch Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 446.

² [*Illinois Mut. Ins. Co. v. Marseilles Manuf. Co.*, 6 Ill. 236, 267-268.]

³ *Allen v. Mut. Fire Ins. Co.*, 2 Md. 111. In this case the title was in point of fact such as to give a lien. *Allen v. Charlestown Mut. Fire Ins. Co.*, 5 Gray (Mass.), 384. In this case the title was a life-estate under a will, subject to contingent possible reduction to an estate in dower. *Sussex County Mut. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 541. *Contra*, *Mutual Ass. Co. v. Mahon*, 5 Call (Va.), 517; *Mutual Ins. Co. v. Deale*, 18 Md. 26.

⁴ 7 Fost. (N. H.) 143.

⁵ 22 Barb. (N. Y.) 527.

⁶ *Gaylord v. Lamar Fire Ins. Co.*, 40 Mo. 13.

chaser at a sheriff's sale before acknowledgment of the deed, applied for insurance, stating that he owned the premises, and it was held no such misstatement as to avoid the policy.¹ An answer to a question as to incumbrances, stating that the applicant, a mortgagee in possession, was first mortgagee, taken together with the fact that the application was for insurance on "dwelling-house," not stated to be the applicant's, is a sufficient statement of the "true title" of the insured.² And a description of the insured as mortgagees is a sufficient statement of the interest of the insured, under a provision that if the interest of the insured be "any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the insured," it must be so expressed in the written part of the policy, and is a true statement of their interest as "mortgagee or otherwise."³ So a *vendee in possession after part payment*, there being no outstanding lien or incumbrance, though he has not received his deed, has such an ownership.⁴ So where two agree to carry on a cotton plantation, one to furnish stock, money, and supplies, the other to furnish the plantation and to superintend the business; the former to be indemnified for his advances out of the proceeds of the cotton, and the stock and implements used to be equally divided at the end of the year, it was held that, the cotton not being worth enough to pay the advances, the partner who had made them was the sole and unconditional owner of the cotton, but not of the stock and implements.⁵ In some States, the mortgagor in possession is the owner of the fee, and when his estate is in fee-simple, and there is no joint tenancy, he has the sole, entire, and unconditional ownership.⁶ And where the prop-

¹ [Susquehanna Mut. Fire Ins. Co. v. Staats, 102 Pa. St. 529.]

² Wyman v. People's Equity Ins. Co., 1 Allen (Mass.), 301.

³ Williams v. Roger Williams Ins. Co., 107 Mass. 377.

⁴ Bonham v. Iowa, &c. Ins. Co., 25 Iowa, 328; Insurance Co. v. Wilgus, 7 W. N. C. (Pa.) 24; Hinman v. Hartford Fire Ins. Co., 36 Wis. 159; Ramsey v. Phoenix Ins. Co., C. Ct. (N. Y.), 2 Fed. Rep. 429.

⁵ Noyes v. Hartford Fire Ins. Co., 54 N. Y. 668.

⁶ Dolliver v. St. Joseph, &c. Ins. Co., 128 Mass. 315; Clay, &c. Ins. Co. v. Beck, 43 Md. 358; Washington Ins. Co. v. Kelly, 32 id. 421; Manhattan Ins. Co. v. Barker, 7 Heisk. (Tenn.) 503; Insurance Co. v. Haven, 95 U. S. 242. As to mortgagor of personal property, see *post*, § 286.

erty belonged to a corporation, but the record title was in fact in the name of an individual corporator, who held for the corporation, the latter was held to be "entire, unqualified, and sole owner," within the meaning of the contract.¹ Such ownership is entirely consistent with outstanding liens and incumbrances.² When the policy required that if the "interest" was other than the "entire, unconditional, and sole ownership," it must be so expressed in the "written part" of the policy, it was held that an outstanding mortgage ought to have been declared and inserted in the policy.³ But a purchaser at sheriff's sale, no purchase-money having been paid, and there being an outstanding right to claim the premises, has not such an ownership;⁴ nor a tenant in possession under a partly executed agreement to purchase, there being an outstanding tax-title;⁵ nor has the holder of a mere legal title, while the equitable estate and interest and the right to be immediately invested with the legal title are in another.⁶ Where the use of real estate is contributed as a partner's share of the capital, there being no deed, directly or in trust, the firm cannot truly describe the property as "theirs," nor have they an entire, unconditional, and sole ownership.⁷ And a mortgage must be disclosed where the "true title and interest" are required.⁸ [If the policy is to

¹ American Basket Co. v. Farmville Ins. Co., C. Ct. (Va.), 8 Ins. L. J. 331. See also Quarrier v. Insurance Co., 10 W. Va. 507.

² Manhattan Fire Ins. Co. v. Weill, 28 Grat. (Va.) 389.

³ McLeod v. Citizens' Ins. Co., 3 R. & C. (Nova Scotia) 156.

⁴ Security Ins. Co. v. Bronger, 6 Bush (Ky.), 146.

⁵ Hinman v. Hartford Fire Ins. Co., 36 Wis. 159.

⁶ Clay Ins. Co. v. Huron, &c. Co., 31 Mich. 346; Farmers' &c. Ins. Co. v. Curry, 13 Bush (Ky.), 312.

⁷ Citizens' Ins. Co. v. Doll, 35 Md. 89.

⁸ Bowditch Mut. Fire Ins. Co. v. Winslow, 3 Gray (Mass.), 415; s. c. 8 id. 38. The plaintiff had lived with his father for about thirty-seven years on land belonging to the town. A barn had been built on it, resting upon abutments of loose stones, which the plaintiff, in October, 1867, insured with defendants. In December, 1867, a patent issued to one F., and in June, 1869, S., claiming through the patentee, recovered judgment in ejectment against the plaintiff and his father, and placed a *hab. fac.* in the sheriff's hands. A few days after, and before it had been executed, the barn was burned. Proceedings in chancery were then pending by the plaintiff, contesting the claim of S. The policy required that the plaintiff in his account of the loss should show the true state of his

be void when the interest of the insured as owner, trustee, consignee, mortgagee, &c., is not truly stated, the failure to disclose a mortgage is fatal. A mortgage may be very material to the underwriter. The interest of the assured in property mortgaged to many times its value is hardly equal to that of an absolute owner, especially if the mortgagor has nothing else with which to pay his debts.¹ JJ. Miller and Irving dissented on the ground that in the enumeration of the policy, a *mortgagee* was mentioned as bound to disclose the particular state of his interest, but not a mortgagor, and that the insertion of one word and omission of the other was strong evidence of an intent to exclude mortgagors from the clause, except as they come under the word "owner." When one takes as his trade name "National Slipper Co." and insures in that name *bona fide*, it is not a breach of the condition to truly state the interest, and an action thereon can be maintained.² The belief of the company that it was insuring a corporation is immaterial.]

[§ 287 A. A condition that if the insured is not the sole, entire, and unconditional owner the policy shall be void is reasonable and valid,³ and violation of it will prevent recovery.⁴ And failure to disclose the real state of the title if not sole, &c. will be fatal although the insured was not questioned as to that fact.⁵]

[§ 287 B. When the conditions require the applicant to have the "entire, unconditional, and sole ownership" a pol-

title at the time of the fire ; and the plaintiff in such account stated that he was *bona fide* owner, and that his title was by possession for thirty years by himself and his father. *Held*, that the account did not give a true statement of plaintiff's title ; that the barn was part of the freehold ; and that he could not recover. Wilson, J., dissenting, on the grounds that the plaintiff, being in possession, and prosecuting his claim in equity, had an insurable interest ; that as against an adverse claimant he might treat the barn as a chattel which he could remove ; and in this view his statement of title was correct. *Sherboneau v. Beaver Mut. Fire Ins. Ass.*, 30 U. C. (Q. B.) 472.

¹ [Westchester Fire Ins. Co. v. Weaver, 70 Md. 536.]

² [Clark v. German Mut. Fire Ins. Co., 7 Mo. App. 77, 82.]

³ [Barnard v. National Fire Ins. Co., 27 Mo. App. 26.]

⁴ [Farmville Insurance, &c. Co. v. Butler, 55 Md. 233.]

⁵ [Waller v. Northern Ass. Co., 2 McCrary, 637, 641 ; Reithmueller v. Fire Assurance, 20 Mo. App. 246.]

icy issued to one who described the property as "his frame dwelling-house," when his only title was under a *quitclaim deed from a second mortgagee*, avoids the policy under the sole ownership clause.¹ If the policy issued to the insured describes the policy as *his*, this implies sole and unconditional ownership, and if he had only a leasehold in the real estate, and a contract for purchase of the personalty, never having paid the price, the policy is avoided.² (a) A surviv-

¹ [Southwick v. Atlantic Fire & Mar. Ins. Co., 133 Mass. 457.]

² [Brown v. Commercial Fire Ins. Co., 86 Ala. 189.]

(a) Misrepresentations as to the insured's ownership are fatal only when fraudulent or material to the risk. *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330; *Western & Atlantic Pipe Liner v. Home Ins. Co.*, 145 Penn. St. 346. Where by an accident policy the beneficiary was warranted to be the assured's wife, when in fact she was his mistress, there was held to be a misrepresentation which forfeited the policy. *Travelers' Ins. Co. v. Lampkin*, 5 Col. App. 177. But where the assured in good faith had his life policy made payable to his wife Mary, whom he had married, and with whom he was living, she was held entitled to its proceeds, though the marriage was void because he was not divorced from his former wife, who was still living. *Overbeck v. Overbeck*, 155 Penn. St. 5.

An assured who represents himself as "owner" of realty is, when not pressed for accurate information, required only to show an insurable interest. *Manchester F. Ass. Co. v. Abrams*, 89 Fed. Rep. 932; *Phoenix Ins. Co. v. Wilson* (Ind.), 20 Ins. L. J. 73; *Phoenix Ins. Co. v. Munger Manuf. Co.*, 92 Texas, 277; *Sisk v. Citizens' Ins. Co.*, 16 Ind. App. 565; *Home Ins. Co. v. Mendenhall*, 163 Ill. 458; *Foley v. Manufacturers' F. Ins. Co.*, 152 N. Y. 131. If, in his application he answers merely "deed" to the question as to his title, this does not warrant absolute ownership in fee, as his deed may be any kind of a deed. *Clawson v. Citizens' Mut. F. Ins. Co.*,

(Mich.) 80 N. W. 573. See *Lindner v. St. Paul F. & M. Ins. Co.*, 93 Wis. 526; *East Texas F. Ins. Co. v. Crawford* (Texas), 21 Ins. L. J. 39.

"Sole and unconditional ownership" is satisfied, as a requirement of the policy, when the insured is the actual and substantial owner, though his title is subject to restrictions, or his power of alienation is limited: *Yost v. McKee*, 179 Penn. St. 381; but not by a part ownership. *Liverpool, &c. Ins. Co. v. Cochran* (Miss.), 29 Ins. L. J. 374. A condition requiring for the future "entire, unconditional, unencumbered, and sole ownership" has been held not to be violated by a written contract to convey. *Arkansas F. Ins. Co. v. Wilson* (Ark.), 55 S. W. 933; see 14 Harv. L. Rev. 157. It is not "sole ownership" to possess a half interest in the insured property and a contract for the purchase of the other half; *Liverpool, &c., Ins. Co. v. Cochran* (Miss.), 26 So. 932. See *Clapp v. Farmers' Mut. F. Ins. Ass'n* (N. C.), 29 Ins. L. J. 468; or to be interested in realty which, when the application for insurance was made, has been sold under the foreclosure of a mortgage, the period for redeeming which has expired. *Planters' Mut. Ins. Co. v. Lloyd* (Ark.), 56 S. W. 44.

Policies conditioned on "sole and unconditional ownership" have been held valid: — where the insured, though equitably owner, and entitled by bond to the benefits of the property, has not paid all the purchase money, nor ob-

ing partner is not the sole and unconditional owner of the

tained a deed, but has fully performed his part up to date, and holds the land under a contract providing that failure to make payments when due should work a forfeiture of all rights thereunder; he can insure for the payments made: see *Manchester F. Ins. Co. v. Abrams*, 89 Fed. Rep. 932, 934; *Pringle v. Des Moines Ins. Co.*, 107 Iowa, 742; *Baker v. State Ins. Co.*, 31 Oregon, 41; *Davis v. Phenix Ins. Co.*, 111 Cal. 409; *Grable v. German Ins. Co.*, 32 Neb. 645; *Loventhal v. Home Ins. Co.*, 112 Ala. 168; *Home Ins. Co. v. Bethel*, 142 Ill. 537: where a husband insured, as his own, furniture belonging to his wife before their marriage, the law of their residence giving to him the "sole management and control of his wife's separate property": *Georgia Home Ins. Co. v. Brady* (Tex. Civ. App.), 41 S. W. 513; where the insured was in possession under a verbal contract to convey, and had made improvements, although the policy called both for sole ownership and title in fee-simple: *Queen Ins. Co. v. May* (Tex. Civ. App.), 35 S. W. 829; see *Liberty Ins. Co. v. Boulden*, 96 Ala. 508; (*Contra*, as to the vendor in such case: *Hamilton v. Dwelling-House Ins. Co.*, 98 Mich. 535); where the grantor's wife did not join in his deed to the insured: *Ohio Farmers' Ins. Co. v. Bevis*, 18 Ind. App. 17; where the plaintiffs advanced money to a partnership to purchase grain, and held warehouse receipts of the firm for their advances, the insurance having been obtained upon the grain as the property of one member of the firm, with the loss payable to the plaintiffs: *Traders' Ins. Co. v. Pacaud*, 150 Ill. 245; see also *Manchester F. As. Co. v. Abrams*, 89 Fed. Rep. 932; *Westchester F. Ins. Co. v. Wagner* (Tex. Civ. App.), 26 Ins. L. J. 261; *Morotock Ins. Co. v. Cheek*, 93 Va. 8; *Traders' Ins. Co. v. Pacaud*, 150 Ill. 245; *Pelzer Manuf. Co. v. Sun Fire Office* (S. C.), 21 Ins. L. J. 952: where a deed was held

in escrow, running to the insured who was in possession, and deliverable on performance of a condition: *Davis v. Pioneer Furniture Co.*, 102 Wis. 394; where the two persons insured were sole owners of the stock of a corporation which had title to the insured property: *North British & Mercantile Ins. Co. v. Bohn*, 49 Neb. 572; *Syndicate Ins. Co. v. Bohn*, 65 Fed. Rep. 165; where the insured had the entire beneficial interest, but the naked legal title was in his wife: *McCoy v. Iowa State Ins. Co.*, 107 Iowa, 80; where the husband insured as sole owner, but his wife had an equal interest; *Miotke v. Milwaukee Mechanics' Ins. Co.*, 113 Mich. 166; *Phenix Ins. Co. v. Angel* (Ky.), 26 Ins. L. J. 722; *Schroedel v. Humboldt F. Ins. Co.* (Tenn.), 23 Id. 240; *Diffenbaugh v. Union F. Ins. Co.*, 150 Penn. St. 270; *Glaze v. Three Rivers Farmers' Mut. F. Ins. Co.*, 87 Mich. 349; *Pelican Ins. Co. v. Smith*, 92 Ala. 428; *German Ins. Co. v. Hyman*, 34 Neb. 704; *Trott v. Woolwich Mut. F. Ins. Co.*, 83 Maine, 362; see *Graves v. Merchants' Ins. Co.*, 82 Iowa, 637; *Webster v. Dwelling-House Ins. Co.*, 53 Ohio St. 558: where by mistake the insured's building was erected chiefly on his own land, but also partly on the street and partly on adjacent land: *Haider v. St. Paul F. & M. Ins. Co.*, 67 Minn. 514; where the insured, being owner, uses another's name in his business: *Phenix Ins. Co. v. McKernan* (Ky.), 27 Ins. L. J. 870; or the policy is issued to a partnership having but one member, and this is known to the insurer's agent. *In re Pelican Ins. Co.*, 47 La. Ann. 935. See *McFetridge v. Phenix Ins. Co.*, 84 Wis. 200.

On the other hand, a contract of sale which passes the equitable title and beneficial interest violates a policy provision against change of title or possession. *Cottingham v. Fireman's Fund Ins. Co.*, 90 Ky. 439. Where the title under a contract was in the vendor,

firm goods.¹ Warranting that he has the sole ownership when he really has only a life estate is fatal to the insured.²

[§ 287 C. The "entire ownership" clause does not necessitate statement of a mortgage. If the company desired information as to mortgages they should have used language to which no doubt could attach.³ A mortgage for the purchase-money or a lien for it by contract, or by the retention of the title by the vendor as security, does not affect the risk nor prevent the insured from being the entire and sole owner. The equitable owner is the entire and sole owner.⁴ And an absolute deed intended as a mortgage does not falsify the claim of sole ownership.⁵ Entire ownership for insurance is not prevented by a lien, or a conditional sale, the vendor remaining in possession.⁶ A warranty of sole ownership is not broken by proof of the pendency of an action not intended to question the ownership but only to establish a lien.⁷ An agreement by the insured with W. that the said

¹ [*Crescent Ins. Co. v. Camp*, 64 Tex. 521; *Insurance Co. v. Camp*, 71 Tex. 503.]

² [*Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202.]

³ [*Clay Fire & Mar. Stock Ins. Co. v. Beck*, 43 Md. 358, 359; *Ellis v. Insurance Co.*, 32 Fed. Rep. 646 (Iowa), 1887; *Friezen v. Allemania Fire Ins. Co.*, 30 Fed. Rep. 352 (Wis.) 1887.]

⁴ [*Insurance Co. v. Crockett*, 7 Lea (Tenn.), 725, 729; *Millville Mut. Fire Ins. Co. v. Wilgus*, 88 Pa. St. 107, 110.]

⁵ [*De Armand v. Home Ins. Co.*, 28 Fed. Rep. 603 (Mich.) 1886.]

⁶ [*Carrigan v. Insurance Co.*, 53 Vt. 418.]

⁷ [*Lang v. Hawkeye Ins. Co.*, 74 Iowa, 673.]

and the vendee was in possession, the latter's assignee of that contract, who holds his assignment merely as a pledge to secure him for moneys advanced, though having an insurable interest, is not the unconditional and sole owner of the contract, and his policy as such owner is void, especially if his interest is less than the insurance. *Gettelman v. Commercial Union Ass. Co.*, 97 Wis. 237. So an assignment for creditors, as authorized by a State statute, avoids the policy. *Orr v. Hanover F. Ins. Co.*, 158 Ill. 149. Other decisions in which the above clause was held not applicable are, *Williamson v. Orient Ins. Co.*, 100

Ga. 791; *Manchester F. Ass. Co. v. Feibelman*, 118 Ala. 308; *Cooper v. Penn. State Ins. Co.*, 96 Wis. 362; *Cushman v. New England F. Ins. Co.*, 65 Vt. 569; *Phila. Fire Ass'n v. Flournoy*, 84 Texas, 632; *Hall v. Niagara F. Ins. Co.*, 93 Mich. 184; *Met'n L. Ins. Co. v. Anderson*, 79 Md. 375. See further on this clause, *Carey v. Liverpool, &c. Ins. Co.*, 92 Wis. 538; *Sun Ins. Co. v. Greenville B. & L. Ass'n*, 58 N. J. L. 367; *Ins. Co. of North America v. Johnson*, 70 Fed. Rep. 794; *Kells v. Northwestern Live-stock Ins. Co.*, 64 Minn. 390.

W. shall have a share in the profits of the goods insured in consideration of certain services, does not prevent the insured from having the "entire, unconditional, and sole ownership" of the goods for his own "use and benefit."¹ Where the insured had a brother who was claimed to be only an employee, although he shared in the profits and losses, and the business was in the name of plaintiff "and brother," and the proofs represented the property as partnership goods, the evidence was given to the jury on the question of no partnership and consequent sole interest.² One who is the sole beneficial owner of property is the sole and absolute owner in respect to insurance, so that the policy will not be void by his failure to state the equitable character of his title.³ The equitable owner in fee is the sole and unconditional owner in respect to insurance.⁴ As where the naked legal title is in A. but the whole beneficial interest and the possession are in B., B. has the entire, unconditional, and sole ownership.⁵ One who has the exclusive use and enjoyment of property without any assertion of an adverse claim by any other person, may insure as sole and unconditional owner.⁶ One in possession under a valid contract of purchase is the sole, &c. owner.⁷ And an assignment of a contract of purchase of land to secure a debt and future advances does not divest the assignor of the "entire, unconditional, and sole ownership" required to recover on the policy.⁸ But mere *verbal* promises without consideration that the plaintiff should be allowed to buy such interests in

¹ [Boutelle v. Westchester Fire Ins. Co., 51 Vt. 4.]

² [Pittsburgh Ins. Co. v. Frazee, 107 Pa. St. 521.]

³ [Lebanon Mut. Ins. Co. v. Erb, 112 Pa. St. 149.]

⁴ [Imperial Fire Ins. Co. v. Dunham, 117 Pa. St. 460, 475; Elliott v. Ashland Mut. Fire Ins. Co., 117 Pa. St. 548.]

⁵ [Martin v. State Ins. Co., 44 N. J. 485; Watertown Fire Ins. Co. v. Simons, 96 Pa. St. 520, 522, 527.]

⁶ [Miller v. Alliance Ins. Co., 7 Fed. Rep. 649, 2nd Cir. N. Y. 1881, 19 Blatch. 308, 12 Rep. 4.]

⁷ [Lewis v. N. E. Fire Ins. Co., 29 Fed. Rep. 496; 24 Blatch. 181 (Vt.), 1886; Dupreau v. Insurance Co., 76 Mich. 615 (vendee legally in possession under part paid contract); Johannes v. Standard Fire Office, 70 Wis. 196 (vendee "not in default.")]

⁸ [Chandler v. Commerce Fire Ins. Co., 88 Pa. St. 223, 227.]

the property as were not already his (promises made by the holders of such interests), will not prevent the policy from being void under the clause requiring the entire interest to be in the assured.¹ When the property is described as belonging to the insured or "held in trust by him" the printed condition about sole ownership does not apply.² When the assured represented himself to be the owner of the insured property, but in answer to the question as to incumbrances, said "Held by contract," the latter answer precluded a warranty of absolute ownership.³

§ 288. **Title ; Absolute Interest ; Leasehold Interest.** — When the policy provides that if the interest to be insured be a leasehold interest, or any interest not absolute, it must be so represented, upon penalty of forfeiture, reference is made to the character, not the quantity, of the interest. An absolute interest is equivalent to vested interest, or an interest so completely vested that the party owning it cannot be deprived of it without his consent. Interest and title are not synonymous. Thus, where the insured had entered into possession, and made valuable improvements, under a parol contract of purchase at an agreed price, part of which had been paid, and his interest was such that the loss would fall upon him if the property should be destroyed, it was held that a statement by the insured that the property was his, was true, and his interest was an absolute one.⁴ So the purchaser of personal property who leaves it with an auctioneer to sell, with instructions to pay a portion of the proceeds to the owner, and to hold the goods generally as security for any advances by the auctioneer, has an "absolute interest."⁵ And where the insured owned the building insured, — a four-story brick building, — and had a lease of the land

¹ [Miller v. Amazon Ins. Co., 46 Mich. 463.]

² [Grandin v. Insurance Co., 107 Pa. St. 26.]

³ [McCulloch v. Norwood, 58 N. Y. 562, 572.]

⁴ [Hough v. City Fire Ins. Co., 29 Conn. 10. And see also Irving v. Excelsior Fire Ins. Co., 1 Bosw. (N. Y. Superior Ct.) 507 ; ante, § 285. But see this section further on. A mere intruder in possession may have such title as possession gives, and that may be absolute, but he has not an "absolute interest." Porter v. Aetna Ins. Co., C. Ct. (Mich.), 6 Ins. L. J. 928.]

⁵ Franklin Fire Ins. Co. v. Vaughan, 92 U. S. 516.

upon which it stood, stipulating that a two-story brick building should be left upon the land at the expiration of the term, the interest was held to be properly stated as his own, and was not a leasehold interest.¹ So where the policy was to be void if the interest in the property insured was a leasehold, or other interest not absolute, and the insured owned the buildings, but had only a lease for years of the land upon which they stood, with the right to remove the buildings at the end of the term, it was held that the insured might recover.² But where the insured was in possession only under an agreement to purchase, having paid but a part of the purchase-money, the policy was held to be void, the insured not having an absolute estate.³ So an interest under a statutory mechanic's lien, not yet confirmed by a decree of court, upon a building standing upon leased land, is covered by a policy which is by its terms to be void if the interest of the insured be a leasehold or other interest not absolute.⁴ (a) But a building standing on leased land, and not described as such, will not be protected by a policy expressly excluding such property from its protection, unless specifically so described and insured as such.⁵ Where lessees of land for a term of years erected thereon a building which was to become the lessor's at the expiration of the term, and insured the property, describing it as "their . . . building," "situated on leased land," their interest was held to be "truly stated" in the policy.⁶ [Violation of a condition in the pol-

¹ *David v. Hartford Fire Ins. Co.*, 13 Iowa, 69.

² *Hope Ins. Co. v. Brolaskey*, 35 Pa. St. 282.

³ *Reynolds v. State Mut. Ins. Co.*, 2 Grant (Pa.), 326 ; *Mers v. Franklin Ins. Co.*, 68 Mo. 127.

⁴ *Longhurst v. Conway Fire Ins. Co.*, U. S. Dist. Ct. Iowa, 1861, cited in *Digest of Fire Insurance Decisions*, 2d ed., by Clarke, p. 584.

⁵ *Kibbe v. Hamilton Mut. Ins. Co.*, 11 Gray (Mass.), 163.

⁶ *Fowle v. Springfield, &c. Ins. Co.*, 122 Mass. 191.

(a) A mechanic's lien is an "incumbrance" within the meaning of a fire policy, and a suit thereon works a forfeiture under a condition against proceedings affecting the title. *Smith v. St. Paul F. & M. Ins. Co.*, 106 Iowa,

225. A sale under such lien does not increase the risk when the period for redemption has not expired. *Greenlee v. North British and Mercantile Ins. Co.*, 102 Iowa, 427.

icy that if the building is on leased ground it must be so expressed, will be fatal although no question was asked in the application in respect to the matter.¹ And land held under a lease to A. and his heirs and assigns forever, reserving a perpetual rent to the grantor, is a leasehold.²

§ 289. **Fee-Simple; Good and Perfect unincumbered Title; Absolute and unconditional Fee-Simple.**—An equitable fee-simple is a title in fee-simple, though the legal title do not pass. Thus, a purchaser in possession, but under a defectively executed deed, has an equitable title in fee-simple. A “less estate” than a fee-simple means an estate of less duration than a fee-simple.³ “A good and perfect unincumbered title” implies a title good both at law and in equity; and an outstanding mortgage undischarged of record, though in fact paid, is a breach of a condition that the property insured has such a title. An insurance company which relies upon its lien might find difficulty in enforcing its lien against such an outstanding mortgage. The proof of payment might not be obtainable, and it is not unreasonable to suppose that a perfect title is required expressly to avoid such difficulties.⁴ An “absolute and unconditional fee-simple” does not exist when the title is by verbal gift, though the donee may have been long in possession and may have made valuable improvements, and though the gift be with a promise of a deed which was in fact executed and delivered before the loss.⁵ Nor can a husband truly state that real estate belonging to his wife is his, when the charter of the company requires that the assured must have a fee-simple estate, or if less than that, the true interest must be stated or the policy will be void.⁶ A mortgagee, in fact, however, who holds by an absolute deed, may describe his

¹ [Ross v. Citizens' Ins. Co., 19 N. B. R. 126.]

² [Dowd v. Amer. Fire Ins. Co., 41 Hun, 139.]

³ Swift v. Vermont Mut. Fire Ins. Co., 18 Vt. 305.

⁴ Warner v. Middlesex Mut. Ass. Co., 21 Conn. 444. But see *post*, § 292.

⁵ Wineland v. Security Ins. Co. (Md.) 9 Ins. L. J. 551.

⁶ Eminence Mut. Ins. Co. v. Jesse, 1 Met. (Ky.) 563. In this case the question was, “Have you a clear title to the property which you wish to be insured?” to which the answer was, “It was the house of J. P. Foree, whose title was as good as any man’s in the country, and who was the father of my wife.”

title as a fee-simple.¹ [An insured having only a life estate, and not so stating, the policy is void.² If the policy is to be void provided the insured is not the owner in fee-simple of the land under the buildings insured, unless the fact be expressed in the policy, a verdict for the insured in a case where it was shown that he was only owner in fee of an undivided portion of the land, and no waiver was proved, should be set aside.³ But a warranty that the insured has the fee-simple is not broken if he is in condition to enforce specific performance of a bond to convey to himself.⁴ When several persons interested in the same property are insured in respect to it, the provision that any interest other than a fee-simple must be stated, applies to their *united* interest, and unless that is less than a fee-simple the provision is inoperative.⁵ A warranty of ownership in fee-simple is not broken where the insured is in a condition to enforce specific performance of a bond to convey.⁶]

§ 290. **Incumbrance.** — The general object of the inquiry as to incumbrance is to ascertain the amount of the interest of the insured in the property as affecting the judgment of the insurers upon the value of the risk, by taking into consideration the motive which the insured may have in the preservation of the property. Mutual insurance companies are also interested to know the amount of the incumbrance with reference to the value of any lien which they may have for the security of the payment of assessments. Statements as to incumbrance are material, and have regard to the risk.⁷ If no inquiry be made, nothing but good faith is necessary, touching the title or interest.⁸ Where the fact of incum-

¹ *White v. Agr. Mut. Ins. Co.*, 22 U. C. (C. P.) 98.

² [*Davis v. Iowa State Ins. Co.*, 67 Iowa, 494.]

³ [*Scottish Union, &c. Ins. Co. v. Petty*, 21 Fla. 399.]

⁴ [*East Tex. Fire Ins. Co. v. Dyches*, 56 Tex. 565.]

⁵ [*Rankin v. Andes Ins. Co.*, 47 Vt. 144, 146.]

⁶ [*East Tex. Fire Ins. Co. v. Dyches*, 56 Tex. 565.]

⁷ *Friesmuth v. Agawam Mut. Ins. Co.*, 10 Cush. (Mass.) 588; *Patten v. Merchants' & Farmers' Ins. Co.*, 38 N. H. 338; *Richardson v. Maine Ins. Co.*, 46 Me., 394; *Gahagan v. Union Mut. Ins. Co.*, 43 N. H. 176; *Schumitsch v. American Ins. Co.*, 48 Wis. 26; *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606.

⁸ *West Rockingham, &c. Ins. Co. v. Sheets*, 26 Grat. (Va.) 854; *Morrison v. Tennessee, &c. Ins. Co.*, 18 Mo. 262.

brance is required to be stated by special conditions or by specific inquiry, a general statement of the fact, without giving the particulars of the amount, is sufficient, even though the amount be called for, if a policy be issued upon the incomplete and general answer. The acceptance of the risk and issue of the policy on the general answer will be deemed a waiver on the part of the insured of further particulars.¹ But if the insured undertake to state the number of mortgages, and does not state them truly, his policy will be void.² And a substantially untrue statement of the amount, with the accrued interest, will also avoid the policy.³ And that, too, without reference to the fact that the company is a foreign one, and has no lien in the State where the insurance is made.⁴

§ 291. **Incumbrance, what is.** — A mortgage, of course, is an incumbrance,⁵ though without consideration, and therefore fraudulent and void as against creditors,⁶ and though unrecorded, if delivered;⁷ although the insured did not acquire title till after the date of the mortgage.⁸ So is a lien for taxes;⁹ and a mechanic's lien, if initiatory steps to enforce it have been taken;¹⁰ and an attachment, if judgment follows;¹¹

¹ *Nichols v. Fayette Mut. Fire Ins. Co.*, 1 Allen (Mass.), 63; *Wyman v. People's Equity Ins. Co.*, 1 Allen (Mass.), 301; *Dohn v. Farmers' Joint-Stock Ins. Co.*, 5 Lans. (N. Y.) 275.

² *Towne v. Fitchburg Mut. Fire Ins. Co.*, 7 Allen (Mass.), 51; *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497; *Battles v. York County Mut. Ins. Co.*, 41 Me. 208.

³ *Lowell v. Middlesex Mut. Fire Ins. Co.*, 8 Cush. (Mass.), 127; *Hayward v. New England Mut. Ins. Co.*, 10 Cush. (Mass.) 444; *Jacobs v. Eagle Mut. Fire Ins. Co.*, 7 Allen (Mass.), 132.

⁴ *Davenport v. New England Mut. Ins. Co.*, 6 Cush. (Mass.) 340.

⁵ *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y.) 624; *Ætna Ins. Co. v. Resh*, 40 Mich. 241; [*Mallory v. Farmers' Ins. Co.*, 65 Iowa, 450].

⁶ *Treadway v. Hamilton Mut. Ins. Co.*, 29 Conn. 68.

⁷ *Hutchins v. Cleveland Mut. Ins. Co.*, 11 Ohio St. 477. Otherwise if not delivered. *Olmstead v. Iowa Mut. Ins. Co.*, 24 Iowa, 503.

⁸ *Packard v. Agawam Mut. Fire Ins. Co.*, 2 Gray (Mass.), 334.

⁹ *Wilbur v. Bowditch Mut. Ins. Co.*, 10 Cush. (Mass.) 446.

¹⁰ *Loughurst v. Conway Fire Ins. Co.*, U. S. Dist. Ct. Iowa, 1861, cited in *Digest of Fire Ins. Decisions* (2d ed.), p. 247; *Redmon v. Phoenix Ins. Co.* (Wis.) 11 Repr. 687; s. c. 10 Ins. L. J. 287.

¹¹ *Brown v. Commonwealth Ins. Co.*, 41 Pa. St. 187.

and a seizure on execution;¹ and a title under a sale on execution, subject to the debtor's equity of redemption;² and an assessment upon a deposit note to pay a loss;³ and a lien for a balance due of the purchase-money where the purchaser is in possession under an agreement for purchase, having paid part of the purchase-money,⁴ and a judgment lien existing at the time of insurance.⁵ (a) [A deposit of title-deeds upon an advance of money creates an equitable lien.⁶ But the mere possession of title-deeds without explanation or evidence of how they were obtained, does not create an equitable mortgage or lien.⁷]

[§ 291 A. **Incumbrance Fatal.** — If the policy is to be void by an incumbrance, without written consent of the company, such incumbrance avoids it, whether known to the assured or not.⁸ (b)

¹ Penn. Ins. Co. v. Gottsman, 48 Pa. St. 151, 158. [But the insured is not bound to disclose a levy and execution on goods still in his possession unless such information is specially called for, or he knows that the levy increases the risk. There was nothing in the policy to warn him that the company regarded the levy as an increase of risk, nor was there any suspicion that the transaction and loss were not honest. Niagara Fire Ins. Co. v. Miller, 120 Pa. St. 504, 516.]

² Campbell v. Hamilton Mut. Ins. Co., 51 Me. 69.

³ Jackson v. Farmers' Mut. Fire Ins. Co., 5 Gray (Mass.), 52; Tuttle v. Robinson, 33 N. H. 104.

⁴ Reynolds v. State Mut. Ins. Co., 2 Grant (Pa.), 326.

⁵ Bowman v. Franklin Ins. Co., 40 Md. 620; Gottsman v. Penn. Ins. Co., 56 Pa. St. 210; Merrill v. Agr. Ins. Co., 73 N. Y. 452; [Leonard v. American Ins. Co., 97 Ind. 299. But the warranty against incumbrances is not broken by the existence of judgments, receipts for the satisfaction of which can be shown, although they are not satisfied of record. Lang v. Hawkeye Ins. Co., 74 Iowa, 673. And where a policy covering real and personal property is to be void if any incumbrance is put upon the property without the company's consent, a judgment against the assured not being an incumbrance on the *whole* property insured, but only on the real estate, is not fatal, for the clause strictly construed refers to incumbrances on the whole property, and it must be strictly construed, the defence being merely technical. Bailey v. Homestead Fire Ins. Co., 16 Hun, 503, 506.]

⁶ [Langston, *Ex parte*, 17 Vesey, 227; Wells v. Archer, 10 S. & R. 412; Whitbread, *Ex parte*, 19 Vesey, 209; Kensington, *Ex parte*, 204, 379.]

⁷ [Chapman v. Chapman, 13 Beav. 308.]

⁸ [Hench v. Insurance Co., 122 Pa. St. 128, if continued to the time of loss; Ellis v. State Ins. Co., 61 Iowa, 577.]

(a) There is an incumbrance of the title as to insurance if the insured takes the property under a will at a stated sum, to be paid in annual instalments. Renninger v. Dwelling-House Ins. Co., 168 Penn. St. 350. (b) A stipulation in a policy against incumbrances without the insurer's con-

A judgment on an official bond though unknown to the insured will avoid his policy, on failure to give the company notice of the incumbrance and pay the additional premium.¹ In this case the mortgage on the property at the time of insurance had been reduced more than the amount of the judgment, so that the total incumbrance was less in amount than at first. The court hinted that on another trial this fact might carry the case against the company.² *A.*, while building a house, negotiated with an insurance agent to insure it. Among the questions asked as a part of the application which the agent was to fill out was, if there was any incumbrance on the building, the answer being no, but that the plaintiff owed for materials and was intending to incumber it to pay for them. In answer to "How much" he was to incumber, he replied that he really did n't know, "not less than \$1000." The agent inserted in the application "incumbrance of \$1000," did not read the same to the plaintiff, and the policy was so made out, with a condition avoid-

¹ [Penn. Mut. Fire Ins. Co. v. Schmidt, 119 Pa. St. 449.] ² [Id. 461.]

sent relates to voluntary incumbrances, and not to judgment liens or other liens created by law. *Lodge v. Capital Ins. Co.*, 91 Iowa, 103; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155. But see *Capital City Ins. Co. v. Autrey*, 105 Ala. 269; *Carey v. German-American Ins. Co.*, 84 Wis. 80; *Walradt v. Phenix Ins. Co.*, 136 N. Y. 375. "Attached," when stipulated against, usually refers to personalty only, attended by a change of possession. *Tefft v. Providence-Washington Ins. Co.* (R. I.), 32 Atl. 914. See *Carey v. German-American Ins. Co.*, 84 Wis. 80; *Carey v. Phenix Ins. Co.*, id. 208; *Wheeler v. Real Estate Title Ins. Co.*, 160 Penn. St. 408. "Increase of risk," when provided against in a policy, relates to change of structure, heating, &c., and not to sales under existing judgments. *Collins v. London Ass. Corp.*, 165 Penn. St. 298. A provision against incumbrances by mortgage, judgment liens, &c., does not cover a

judgment on tax lien *in invitum* against the insured while the policy is in force, further than to make it voidable according to such conditions as the policy contains. *Gerling v. Agricultural Ins. Co.*, 39 W. Va. 689; *Dover Glass Works Co. v. American F. Ins. Co.*, 1 Marvel (Del.), 32; *Lodge v. Capital Ins. Co.*, 91 Iowa, 103. But an express provision avoiding the policy if the insured property is levied upon or taken into possession or custody under any legal process, is valid; and even if a part only of such property is attached, the contract, being indivisible, is wholly void. *Burr v. German Ins. Co.*, 84 Wis. 76.

A stipulation avoiding the policy if the insured property becomes involved in litigation is not against public policy. *Small v. Westchester F. Ins. Co.*, 51 Fed. Rep. 789. That clause refers only to litigation respecting the insured's title or possession, and not to a suit to eject a tenant. *Hall v. Niagara F. Ins. Co.*, 93 Mich. 184.

ing it, if the amount was increased without the company's consent. *A.* subsequently gave a mortgage for \$1500 on it, and the policy was held avoided.¹ A partner's mortgage of his interest to a third party violates the condition against incumbrance of the firm property insured.^{2]}

§ 292. **Incumbrance, what is not.** — A mortgage which has been paid, though not discharged of record, is no longer an incumbrance.³ Nor is an invalid mortgage.⁴ [Nor a mortgage barred by the statute of limitations at the time the policy is issued.^{5]} Nor is a bond for the conveyance of the premises insured, upon the payment of the purchase-money at a specified time, although the forfeiture on account of the expiration of the time has been waived, if, in fact, the money has not been paid;⁶ nor a bond by the grantee in a deed to support the grantor, given as a part of the consideration for the conveyance;⁷ nor a vendor's lien;⁸ nor is a judgment against one of several insurers.⁹ In *Jackson v. Farmers' Mutual Fire Insurance Company*,¹⁰ the question arose whether a liability for an assessment on a deposit note, laid under a policy which was afterwards declared void on account of an increase of the risk, was an incumbrance such as ought to have been disclosed by the insured in a new policy taken out from another company after the increase of

¹ [Sentell v. Oswego Co. Farmers' Ins. Co., 16 Hun, 516, 519.]

² [Hicks v. Farmers' Ins. Co., 71 Iowa, 119.]

³ *Hawkes v. Dodge County Mut. Ins. Co.*, 11 Wis. 188; *Merrill v. Agr. Ins. Co.*, 73 N. Y. 452. But see *Warner v. Middlesex Mut. Ass. Co.*, 21 Conn. 444; *ante*, § 289. And an outstanding undischarged mortgage has been held to be an incumbrance, though actually paid by services rendered to the mortgagee by the mortgagor, and while the former was ready to cancel the mortgage. *Muma v. Niagara, &c. Ins. Co.*, 22 U. C. (Q. B.) 214; [The doctrine of the text is affirmed in *Smith v. Niagara Fire Ins. Co.*, 60 Vt. 682, citing all the cases of this note.]

⁴ *Watertown Fire Ins. Co. v. Grover, &c. Co.*, 41 Mich. 131.

⁵ [Lockwood v. Middlesex Mut. Ass. Co., 47 Conn. 553.]

⁶ *Newhall v. Union Mut. Fire Ins. Co.*, 52 Me. 180.

⁷ *Mason v. Agr. &c. Ass. Co.*, 18 U. C. (C. P.) 19. [In Canada, however, it has been held that concealment of the fact that property is charged with the maintenance of the plaintiff's father is the concealment of an incumbrance, but bad faith must be shown. *Reddick v. Saugeen Mut. Fire Ins. Co.*, 14 Ont. R. 506.]

⁸ *Dohn v. Farmers' Ins. Co.*, 5 Lans. (N. Y.) 275.

⁹ *Miller v. Germania Ins. Co.*, C. C. P. (Pa.), 6 Ins. L. J. 873.

¹⁰ 5 Gray (Mass.), 52.

risk and before the policy was declared void, and was discussed, though not decided, with an evident inclination to the negative. "It will be a grave question, we think," says Shaw, C. J., "whether a remote contingent liability or possibility of charge for a very minute assessment is an incumbrance within the meaning of this contract of insurance. Perhaps a different rule may apply in covenants against incumbrances, because founded on a different reason; thus a purchaser, having paid a full compensation for the estate, with all its benefits, has a right to expect in his grant and covenants an indefeasible title without further charge. . . . It is, in effect, a stipulation that if there be any charge upon the estate, known or unknown, the vendor of the estate will pay the expense of removing it. Should the same rule apply to this subject of representation with a view to insurance, every married man making application for an insurance, in answer to the question whether his estate is incumbered, must state that he has a wife living, otherwise the policy would be void." A tax-title held by a third party whose relations are such that he would be held in equity as trustee, has been held to be no incumbrance.¹ And a contingent right of dower or curtesy is no incumbrance.² It may be otherwise where, after the death of the husband, dower has attached.³ Incumbrances "without the consent" of the company do not include those liens and claims — such, for instance, as judgment liens — which are enforceable against the will of the insured, but only such as may be created by his consent, and on application to the company for its consent.⁴

[§ 292 A. *No Incumbrance.* — The word "incumbrance" has no reference to an involuntary lien effected by the law, where the condition is "If the property shall hereafter be

¹ Newman v. Springfield Fire & Mar. Ins. Co., 17 Minn. 123.

² Virginia Fire, &c. Ins. Co. v. Kloeber (Va.), 9 Ins. L. J. 354; Commercial Ins. Co. v. Spankueble, 52 Ill. 53; Virginia Ins. Co. v. Kloeber (Va.), 9 Ins. L. J. 30.

³ Security Ins. Co. v. Bronger, 6 Bush (Ky.), 147.

⁴ Green v. Homestead Ins. Co. (N. Y.) 10 Ins. L. J. 175; Baley v. Homestead Ins. Co., 80 N. Y. 21; [Steen v. Niagara Falls Ins. Co., 61 How. Pr. 144, 148].

come mortgaged or incumbered.”¹ The question “Is there a mortgage, deed of trust, lien, or incumbrance of any kind on property?” relates only to incumbrances created by act or consent of the party, and an omission to state a statute lien for unpaid taxes is no breach of warranty.² The court gives no reason for this opinion. If the reason for wishing to know of incumbrances is to gauge the applicant’s interest to care for the property, then a statute lien is as much within the reason as any other if the assured knows of it. It certainly is covered by the words “lien or incumbrance of any kind,” and unless the applicant was ignorant of the fact that taxes were a lien, which fact did not appear, he should have stated the tax lien. If the assessment is illegal of course there is no incumbrance by it.³ Neither the entry of land in an assessment roll nor the assessment and subsequent levy of a tax thereon is a breach of a covenant against incumbrances in a deed of the land made after completion of the assessment roll but before a levy of the tax.⁴ A policy, to be void if the property is incumbered by mortgage or otherwise, is not rendered invalid by the existence of a lien, if no questions were asked or representations made about the matter at the time of application or issuance of the policy.⁵ A lease of five years is not an incumbrance.⁶

[§ 292 B. **Misrepresentation and Concealment.** — Concealment of an existing incumbrance avoids a policy when the act of incorporation so provides.⁷ Failure to state a mortgage of \$450 and falsely affirming that there were no incumbrances is fatal.⁸ So, alleging the amount of incumbrance to be “about \$3,000” when in fact it was \$4,000.⁹ So, stating an incumbrance of \$4,400 at \$3,000.¹⁰ If the insured

¹ [Phenix Ins. Co. v. Pickel, 18 Ins. L. J. 592 (Ind.) May, 1889.]

² [Hosford v. Hartford Fire Ins. Co., 127 U. S. 404.]

³ [Runkle v. Citizens’ Ins. Co., 11 Ins. L. J. 94; 6th Cir. (Ohio), 1882.]

⁴ [Barlow v. St. Nicholas Nat. Bank, 63 N. Y. 399, 404.]

⁵ [Dwelling-House Ins. Co. v. Hoffman, 125 Pa. St. 626.]

⁶ [Lockwood v. Middlesex Mut. Ass. Co., 47 Conn. 553.]

⁷ [Gahagan v. Insurance Co., 43 N. H. 176, 177.]

⁸ [Indiana Ins. Co. v. Brehm, 88 Ind. 578.]

⁹ [Hayward v. New Eng. Mut. Fire Ins. Co., 10 Cush. 444, 445.]

¹⁰ [Glade v. Germania Fire Ins. Co., 56 Iowa, 400.]

warrants that he has given all information material to the risk, it is a breach if he says nothing about a mortgage which he *believes* to be outstanding on the property, although the mortgage may in fact have been paid without his knowledge. The moral hazard is the same if he believes the place to be mortgaged, as if it were so.¹ If an applicant states that there is no incumbrance when in fact there is a mortgage, the materiality of the misstatement is for the jury.²

A. sold an estate to B., covenanting for a perfect title and agreeing to pay off an old mortgage of \$200, B. gave the vendor back a mortgage and insured, representing that the latter was the only incumbrance. It was held that in equity this was so, since B. could extinguish the old mortgage by the amount he would have to pay on his own, and the court would not allow the insurer to avoid the policy for mere technical and formal defects.³ Where an incumbrance of \$37,000 on the property insured has been changed by parol agreement to one of \$12,000, which is named to the insurance company, the latter cannot avoid the policy on the ground that in reality the parol agreement was void under the statute of frauds, wherefore the real incumbrance was \$37,000. A stranger to the contract cannot raise such a plea.⁴ Misstatements of incumbrances or subsequent incumbrances on portions of the plaintiff's farm, none of which incumber the land on which the insured building stands, do not avoid the policy.⁵ When a policy stipulated that it should be void unless the incumbrance, if any, was *expressed therein*, it was held that the mere stating that there was an incumbrance without stating the amount was a sufficient compliance with the requirement of the policy and charter.⁶ Where the questions and answers were: "Is there any incumbrance on the property? — Yes. If mortgaged, state the

¹ [Smith v. Niagara Fire Ins. Co., 60 Vt. 682, 690.]

² [Sweat v. Piscataquis Mut. Ins. Co., 79 Me. 109.]

³ [Ring v. Windsor Co. Mut. Fire Ins. Co., 54 Vt. 434.]

⁴ [Mutual Mill Ins. Co. v. Gordon, 20 Brad. 565.]

⁵ [Eddy v. Hawkeye Ins. Co., 70 Iowa, 472.]

⁶ [Bersche v. St. Louis Ins. Co., 31 Mo. 555, 560.]

amount. — \$3,000," an omission to state other incumbrances did not avoid the policy.¹]

§ 293. **Incumbrance; Several Mortgages.** — If a mortgagee insures his interest as mortgagee, under a provision calling for incumbrances calculated to affect the interest, other mortgages should be stated.² But where the insurance is specifically upon the particular interest, and not upon the property, other incumbrance upon the property need not be stated; as where a "mechanic's lien on the Lawrence Block" was specified as the subject-matter of insurance, and a negative answer to the question whether "it" was incumbered was given, it was held that this was no misrepresentation, although there were other liens upon the same block.³

§ 294. **Incumbrance made after Application; Reduction of Interest.** — In *Howard Fire Insurance Company v. Bruner*,⁴ application was made for insurance July 17, and the policy countersigned and issued on the 25th of the same month. A mortgage existing on the 17th was disclosed in the application, but a mortgage executed on the 25th, and after the delivery of the policy, was not disclosed. And it was held that it need not be, as it was a subsequent incumbrance, whereas the inquiry related only to existing incumbrances. (*a*) And in *Dutton v. New England Mutual Fire Insurance Company*,⁵ a mortgage executed on same day when the policy was issued, but whether before or after delivery of the policy did not appear, was held to be a subsequent incumbrance which the applicant was not bound to disclose in reply to the interrogatory on that point, whether executed before or

¹ [*Hosford v. Germania Fire Ins. Co.*, 127 U. S. 399.]

² *Addison v. Kentucky & Louisiana Ins. Co.*, 7 B. Mon. (Ky.) 470; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253; *Rex v. Insurance Companies*, 2 Phila. (Pa.) 357.

³ *Longhurst v. Conway Fire Ins. Co.*, U. S. Dist. Ct. Iowa, 1861.

⁴ 23 Pa. St. 50.

⁵ 9 Fost. (N. H.) 153.

(*a*) A clause in a policy providing that the company shall not be bound by any act of or statement to the agent not contained in the policy or the written application for insurance, and other preliminary papers, is held only to affect statements and acts of agents and others after the delivery and acceptance of the policy. *Hoose v. Prescott Ins. Co.*, 84 Mich. 309; *Ahlberg v. German Ins. Co.*, 94 id. 259.

after the delivery of the policy, as it was not an incumbrance when the application was filed and the answer made, five days before. What would be the effect if the mortgage was in contemplation at the time the application was filed, and purposely kept open till after the delivery of the policy, was not decided. But it was intimated that such facts might amount to a fraudulent concealment of a fact material to the risk. Where a policy was assigned by consent of the insurers to the plaintiffs, and afterwards the insured mortgaged the property insured to the plaintiffs to protect them as accommodation indorsers for the insured, it was held that this was not such an incumbrance as was contemplated in the policy, which provided for notice of any incumbrance "sufficient to reduce the real interest of the insured to a sum only equal to, or below, the amount insured."¹ The confession of a judgment to a greater amount than the value of the insured property is a sufficient reduction of the assured's interest therein "below the amount insured" to work a forfeiture of a policy having a condition against such a reduction, though no execution issue upon the judgment.² If the condition be against incumbrances made by the applicant, one made by the assignee of the property does not work a forfeiture.³ [When a mortgage, given without the company's knowledge and in violation of a condition in the policy, is produced in evidence, the presumption, in the absence of evidence to the contrary, is that the amount for which the mortgage was given is still due thereon.⁴ An incumbrance in violation of the policy only suspends it, and if paid before loss the policy revives.⁵

¹ *Allen v. Hudson River Mut. Ins. Co.*, 19 Barb. (N. Y.) 443. It certainly seems an extremely liberal interpretation in favor of the insured, to protect him against the consequences of a material change, effected by himself, in the status of the property insured, between the time of the application and that of issuing the policy, by holding that the insurance is by relation from the date of filing the application. Besides opening a wide door to fraud, it does not seem to be in accordance with the well-settled doctrine that a material change intervening, pending the negotiations, ought to be disclosed. See *ante*, § 190.

² *Kensington Bank v. Yerkes*, 86 Pa. St. 227.

³ *Richardson v. Canada, &c. Ins. Co.*, 16 U. C. (C. P.) 430.

⁴ [*Gould v. Holland Purchase Ins. Co.*, 16 Hun, 538, 540.]

⁵ [*Kimball v. Monarch Ins. Co.*, 70 Iowa, 513.]

Paying off an old mortgage and giving a new one. — If the policy is conditioned against mortgaging without consent, the paying off of an existing mortgage does not authorize the giving of a new one, however small, to another party.¹ But in Iowa it is held that if at the time of insurance there is a mortgage on the property and this is subsequently paid off and a new one put on, the question is whether the risk has been increased.^{2]}

§ 294 a. **Notice.** — [A condition in a policy that any lien or judgment upon the property insured must be made known to the company or the policy will be void, is a warranty on the part of the assured that must be strictly complied with.³ A delay of giving notice for fifty days after mortgaging the property is unreasonable and avoids the policy.^{4]} Depositing notice in the mail with the proper address is *prima facie*, and only *prima facie*, evidence that it was received.⁵ An indorsement on the policy that the loss is to be payable to the incumbrancer, is notice that the property is incumbered.⁶ [Although the by-laws provide that notice of incumbrances shall be given, yet an incumbrance without notice will not avoid the policy unless it is expressly so stipulated either in the policy or the organic law.^{7]}

§ 294 b. **Waiver.** — But here, as in other cases of defective or untrue statements, knowledge of the untruth at the time of the issue of the policy is a waiver of the right to avoid the policy therefor.⁸ So if the answer, erroneous in fact, is made by the advice of the agent as a proper answer;⁹ or he,

¹ [Hankins v. Rockford Ins. Co., 70 Wis. 1, 4.]

² [Russell v. Cedar Rapids Ins. Co., 71 Iowa, 69.]

³ [Egan v. Mutual Ins. Co., 5 Denio, 326, 328 ; Seybert's Adm. v. Penn. Mut. Fire Ins. Co., 103 Pa. St. 282.]

⁴ [McGowan v. People's Mut. Fire Ins. Co., 54 Vt. 211.]

⁵ Plath v. Minn. Ins. Co., 23 Minn. 479.

⁶ Insurance Co. v. M'Dowel, 50 Ill. 120.

⁷ [Tiefenthal v. Citizens' Mut. Fire Ins. Co., 53 Mich. 306, 308-309.]

⁸ Union Ins. Co. v. Chipp, 93 Ill. 96.

⁹ *Etna, &c. Ins. Co. v. Olmstead*, 21 Mich. 246. [The omission of an incumbrance caused by the advice of the agent cannot be taken advantage of by the company in the absence of fraud. *Carr v. Fire Ass. Assoc.*, 14 Ont. R. 487.]

being duly informed of the facts, neglects to make the proper statement or indorsement of the facts so stated;¹ (a) or adjusts the loss.²

[§ 294 C. It has been held that a policy insuring *A. B.* "as his interest may appear," waives the conditions requiring a specific statement of such interest in the policy.³ An agent to solicit insurance and issue policies countersigned by himself, may waive the condition requiring specification that the ground is leased.⁴ The condition as to sole ownership may be waived, but not so as to make the policy cover goods not described in it, and owned by persons not named in it.⁵ Where the company, ten days after issue of the policy, indorsed it as payable to the mortgagee, the breach of condition as to ownership which the formerly undisclosed mortgage constituted was held to be waived.⁶ Although the applicant represents that there is no incumbrance when really there is a mortgage, if before the fire a new mortgage is substituted for the old one and the company assents to the new one, it is estopped to set up the misrepresentation.⁷ Where an agent made out the application in his office in the absence of the plaintiff, and later took it and the policy made out and signed to the plaintiff, and did not read to him (he being a foreigner and unable to understand English) nor cause to be translated to him the same, but told him it was all right, and obtained his signature; if no inquiries as to incumbrances were made of the plaintiff, — it is a waiver of

¹ *Richmond v. Niagara Fire Ins. Co.*, 79 N. Y. 230; 9 Ins. L. J. 117; *Smith v. Commonwealth Ins. Co.*, 49 Wis. 322.

² *Eagan v. Aetna, &c. Ins. Co.*, 10 W. Va. 583. See also *Titus v. Glens Falls Ins. Co.* (N. Y.), 9 Ins. L. J. 664; *Van Schoick v. Niagara*, 68 N. Y. 434; *State Ins. Co. v. Todd*, 83 Pa. St. 272.

³ [*De Wolf v. Capital City Ins. Co.*, 16 Hun, 116, 118.]

⁴ [*Home Ins. Co. v. Duke*, 84 Ind. 253.]

⁵ [*Fuller v. Phoenix Ins. Co.*, 61 Iowa, 350.]

⁶ [*Lewis v. Council Bluffs Ins. Co.*, 63 Iowa, 193.]

⁷ [*Lebanon Mut. Ins. Co. v. Losch*, 109 Pa. St. 100.]

(a) "Indorsements on the policy" the policy is issued. *Hoose v. Prescott* of the title or changes therein, or of Inds. Co., 84 Mich. 309, 322.
mortgages, relate to transactions after

the company's right to have the plaintiff disclose the fact of a mortgage on his property.¹ (a)]

[§ 294 D. **Knowledge of the Company.** — A description which gives the company constructive notice that the buildings are on United States land, destroys the condition that the insured must have the fee-simple.² If the policy requires that the insured shall be the fee-simple owner, but the application which is made a part of the policy shows clearly that such is not the case, the condition is waived by the issue of the policy on the basis of the application.³ If the applicant says that an incumbrance exists without stating the amount, the issue of a policy waives any further disclosure.⁴ When at the time of issuing the policy the company knew of the existence of a mortgage on the insured property, they cannot set it up as a defence to an action on the policy on the ground of breach of warranty.⁵]

[§ 294 E. **Knowledge of the Agent.** — If the agent knows at the time of issuing the policy that the building is on leased ground, though no mention is made of the fact in the application, it will not avail the company. The issue of a policy on a known state of facts waives all conditions inconsistent therewith.⁶ (b) If the agent read the lease, the policy

¹ [Geib v. Insurance Co., 1 Dillon, 443.]

² [Broadwater v. Lion Fire Ins. Co., 34 Minn. 465.]

³ [Lamb v. Council Bluffs Ins. Co., 70 Iowa, 238. See however, *Eminence Mut. Ins. Co. v. Jesse*, 1 Met. (Ky.) 563; *supra*, § 289, n. 3.]

⁴ [Nichols v. Fayette Mut. Fire Ins. Co., 1 Allen, 63.]

⁵ [Bidwell v. North West Ins. Co., 24 N. Y. 302, 304.]

⁶ [Germania Fire Ins. Co. v. Hick, 125 Ill. 361; *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551; *Holmes v. Drew*, 16 Hun, 491, 493; *Sentell v. Oswego Co. Farmers' Ins. Co.*, 16 Hun, 516, 518; *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa, 253, 255.]

(a) If the applicant is not asked as to existing incumbrances, his failure to disclose an existing mortgage on the property is not such concealment or misrepresentation as avoids the policy. *Koshland v. Hartford Ins. Co.*, 31 Oregon, 402; *Seal v. Farmers' & Merchants' Ins. Co. (Neb.)*, 80 N. W. 807; see *Sproul v. Western Ass. Co.*, 33 Oregon, 98. So conditions in the policy as to title and vacancy are deemed waived,

when the applicant is not questioned thereon, especially when the facts are known to the insurer's agent. *Cross v. National F. Ins. Co.*, 132 N. Y. 133. Intent to deceive the insurer is not presumed from the simple fact of falsity in a statement by the insured. *Dolan v. Mutual Reserve Fund Life Ass'n*, 173 Mass. 197.

(b) *London & L. Fire Ins. Co. v. Fischer*, 92 F. 500.

cannot be avoided on the ground that the interest of the assured was not a fee-simple, or that the lessor had by the lease a *lien* on the buildings for the rent.¹ When the assured had a fee-simple title subject to a \$10,000 incumbrance, which was known to the agent, but the assured answered "fee-simple" in response to the question as to interest, and it so appeared in the policy, it was held that the policy was not avoided, though it contained a forfeiture clause if the question should be wrongly answered.² Parol evidence is admissible to show that the assured stated to the company's agent that there was an incumbrance on the property, although the policy declares there is none.³ The applicant stated to the agent that he was in possession under a contract for purchase. The policy contained no such statement, but was conditioned to be void if the insured was not the sole, absolute, and unconditional owner, and also provided that no agent of the company should be held to have waived any condition of the policy unless such waiver were indorsed thereon. It was held that the company was estopped by the knowledge of the agent. (a) The court said, quoting a former case: "The principle that if statements in the application, relied upon as breaches of warranty, are inserted by the agent of the insurers without any collusion or fraud on the part of the insured, the insurer is estopped

¹ [Dresser v. United Firemen's Ins. Co., 45 Hun, 298.]

² [Home Mut. Fire Ins. Co. v. Garfield, 60 Ill. 124, 127.]

³ [Boetcher v. Hawkeye Ins. Co., 47 Iowa, 243, 255.]

(a) See London & L. F. Ins. Co. v. v. Security F. Ins. Co., 99 Iowa, 382; Fischer, 92 Fed. Rep. 500; Ins. Co. of Greenlee v. Iowa State Ins. Co., 102 North America v. Bachler, 44 Neb. 549; Iowa, 260; Robbins v. Springfield F. & McGonigle v. Susquehanna Mut. F. Ins. M. Ins. Co., 149 N. Y. 477; Frane v. Co., 168 Penn. St. 1; McGonigle v. Burlington Ins. Co., 87 Iowa, 288; Agricultural Ins. Co., 167 id. 364; Beebe v. Ohio Farmers' Ins. Co., 93 Sproul v. Western Ass. Co. (Oregon), Mich. 514; McFetridge v. American F. 54 Pac. 180; Phenix Ins. Co. v. Hart, Ins. Co., 90 Wis. 138; McFarland v. 149 Ill. 513; Summerfield v. North Kittanning Ins. Co., 134 Penn. St. 590; British & Merc. Ins. Co., 62 Fed. Rep. Bosworth v. Merchants' F. Ins. Co., 80 249; Phenix Ins. Co. v. Warttemberg, Wis. 393; Gristock v. Royal Ins. Co., 79 id. 245; McElroy v. British America 87 Mich. 428; Lyon v. Dakota Ins. Co., Ass. Co., 94 id. 990; Arthur v. Palatine 6 Dak. 67. Ins. Co. (Oregon), 57 Pac. 62; Corkery

from setting up their error or falsity, seems now well settled.”¹ Where the insured, B., told the agent that the property belonged to his wife, but the agent, contrary to instructions and without the knowledge of B. made the policy in B.’s name, it was held that B. could sue in his own name for the use of his wife, though the policy contained a provision that if the insured is not the absolute owner the fact must be expressed in writing on the policy.² And where a husband took out insurance on his wife’s property in his own name, the agent knowing the facts and failing to state the wife’s interest in the policy, it was held that the company was chargeable with his knowledge, and the husband could sue in his own name for his wife’s loss.³ Orally the applicant stated all incumbrances. The agent, without knowledge of applicant, made out an application omitting the incumbrances. It was held that the applicant was not bound by the written application, and that there was no breach of the condition in the policy requiring statement of incumbrances in the application.⁴ When the assured stated in his application that there were no incumbrances on the property, and on the trial the defendants proved that there were, evidence was held admissible to explain that the company’s agent knew of this at the execution of the policy.⁵ (a)

¹ [Miaghan v. Hartford Fire Ins. Co., 24 Hun, 58, 60. See also Mark v. National Fire Ins. Co., 24 Hun, 565. The policy contained a similar clause as to whole ownership, and the agent knew that Mark was not sole owner of the boat insured.]

² [Deitz v. Insurance Co., 31 W. Va. 851.]

³ [Hunt v. Mercantile Ins. Co., 22 Fed. Rep. 503 (Mo.) 1884.]

⁴ [Benninghoff v. Agricultural Ins. Co., 93 N. Y. 495.]

⁵ [Patten v. Merchants’ & Farmers’ Mut. Fire Ins. Co., 40 N. H. 375, 380.]

(a) The insurer’s agent may waive unconditional ownership. *Bateman v. Lumbermen’s Ins. Co.*, 189 Penn. St. 465; *Breedlove v. Norwich Union F. Ins. Co.*, 124 Cal. 164; *London & L. F. Ins. Co. v. Gerteson* (Ky.), 28 Ins. L. J. 653; *Graham v. American F. Ins. Co.*, 48 S. C. 195; *Dupuy v. Delaware Ins. Co.*, 63 Fed. Rep. 680; *Rockford Ins. Co. v. Farmers’ State Bank*, 50 Kansas, 427; *Capital Ins. Co. v. Pleasanton Bank*, id. 449; *Carpenter v. German American Ins. Co.*, 135 N. Y. 298; *McMurray v. Capital Ins. Co.*, 87 Iowa, 453; *Robison v. Ohio Farmers’ Ins. Co.*, 93 Mich. 533. Where the policy requires a mortgagee to notify the insurer of change of title or increase of risk, and to have the same indorsed on the policy, notice thereof to a former agent, given in ignorance that his agency had ceased, is a sufficient compliance with

Where the statement of the assured does not amount to a warranty and was made without fraud, knowledge of the agent binds the company. A report of the agent stating that there are no incumbrances subsequent to the application, and without knowledge of the assured, does not bind the latter.¹ But if a warranty that there are no incumbrances is written with the assent of the insured, who states to the agent that he don't know for certain whether there are any or not, and the statement turns out untrue, the policy is void. The fact that the agent was a director is immaterial; there is a clear breach of warranty.² And failure at the trial to prove the title which the insured told the agent he possessed, it appearing on the contrary that the title to the property is in another, will prevent recovery by the insured.³

[§ 294 F. On the other hand, it has been held that if the policy prohibits waiver by the agent, the assured is bound by the provision, and an attempted waiver of the condition against incumbrance will not avail.⁴ In the absence of fraud or mistake, a party will not be heard to say he was ignorant of the contents of a document signed by him without compulsion.⁵ Where the applicant told the agent that

¹ [Phenix Ins. Co. v. LaPointe, 17 Brad. 248.]

² [Blooming Grove Mut. Fire Ins. Co. v. McAnerney, 102 Pa. St. 335.]

³ [Carpenter v. German-American Ins. Co., 52 Hun, 249.]

⁴ [Hankins v. Rockford Ins. Co., 70 Wis. 1.]

⁵ [Cuthbertson v. Insurance Co., 96 N. C. 480.]

such stipulation. *Whitney v. American Ins. Co.* (Cal.), 56 Pac. 50. Knowledge of such an agent, when the insurance is effected, of the state of the title, when acquired verbally or by the answers in the application, is equivalent to actual notice given by the insured, and overrides the conditions in the policy. *Cowart v. Capital City Ins. Co.*, 114 Ala. 356; *Schaeffer v. Farmers' M. F. Ins. Co.*, 80 Md. 563; *Home Ins. Co. v. Mendenhall*, 168 Ill. 458; *Davis v. Phoenix Ins. Co.*, 111 Cal. 409; *Parsons v. Knoxville F. Ins. Co.*, 132 Mo. 583;

Wooliver v. Boylston Ins. Co., 104 Mich. 95; *Home Ins. Co. v. Gibson*, 72 Miss. 58; *Westchester F. Ins. Co. v. Wagner*, 10 Tex. Civ. App. 398. But written statements of the agent, without such knowledge, do not bind the company. *Cornell v. Tiverton Mut. F. Ins. Co.* (R. I.), 35 Atl. Rep. 579. A defect in pleading on a fire policy, in not stating the plaintiff to be owner, is cured by a verdict in his favor. *Western Ass. Co. v. Ray* (Ky.), 49 S. W. 326; but see *Western Ass. Co. v. McCarty*, 18 Ind. App. 449.

there was a mortgage on the land, but none on the house which he held in fee unincumbered, and the application said "title in fee" and "no incumbrance," it was held that the policy was void for non-disclosure of incumbrances, the house being insured not as a chattel but as realty. Armour, J., however, properly dissented, holding that the house was really a chattel resting merely on blocks, and that the mortgage was not in the least material.^{1]}

[§ 294 G. **No Waiver or Estoppel.** — When the policy provides that if the interest of the assured be other than sole, unconditional, &c., it must be so expressed in the policy, the insured if owner otherwise than as above must state his interest, and the fact that the agent made no inquiry and the assured no statement of the same, is not a waiver by the company.² A vote of the company's directors, authorizing one of their number to settle the claim, part payments made by them to plaintiff's creditors when summoned as trustee, and the statements of one of the directors that the claim ought to be paid, — will not estop them from defending against the action³ of the assured, on the ground of fraudulent and untrue statements as to incumbrances in the application, which is part of the policy, if the assured has not changed his position in consequence of the action of the company. Failure to state that the ground is leased is fatal to a policy requiring such statement, and employment of an adjuster by the company before it knows of the plaintiff's title, is not a waiver.⁴ A verbal agreement during the negotiations that the insured may mortgage the premises at a future day, which agreement is not mentioned in the policy, is no part of the contract of insurance, and if the insured does so mortgage, the condition against incumbrances is violated.^{5]}

¹ [Phillips v. Grand Riv. F. Mut. Fire Ins. Co., 46 U. C. R. (Q. B.) 334.]

² [Waller v. Northern Ass. Co., 10 Fed. Rep. 232, 235; 2 McCrary, 637; 8th Cir. Iowa, 1881.]

³ [Murphy v. People's Eq. Mut. Fire Ins. Co., 7 Allen, 239.]

⁴ [Security Ins. Co. v. Mette, 27 Brad. 324; Illinois Mut. Ins. Co. v. Mette, Id. 330.]

⁵ [McNierney v. Agricultural Ins. Co., 48 Hun, 239. See § 192.]

CHAPTER XIV.

HEALTH, HABITS, AGE, ETC.

ANALYSIS.

- § 295. "Good health" and "sound health" mean reasonable, not *perfect* health. A healthy life is one insurable at ordinary rates. Freedom from serious disease is sufficient. Slight dyspepsia no breach of the warranty, but Bright's disease or drunkenness fatal. Tendency to shorten life means substantial tendency; all disorders do so in some degree. Wound affecting bladder, spasms, gout, dyspepsia.
- Consumption.
Honest answers liberally construed.
- § 296. "Tendency to shorten life;" drunkenness a breach of the warranty "no habit obviously tending to shorten life."
Serious illness or injury is one that permanently impairs the constitution and increases the risk. No absolute test is possible. It has been said that an honest belief in the truth of the answer is all that is required; but there is authority that due care must be exercised in forming the belief (see also next section). Failure to speak of illnesses so slight as to be beyond the reasonable contemplation of the parties, is of no effect. "Hereditary disease," "local disease," "disease requiring confinement." Malaria, rupture, tubercles, sunstroke, pneumonia. Company must show not only insanity in ancestor, but also that it is hereditary.
- § 297. The insured must answer in good faith and according to the knowledge he has, or as an ordinarily intelligent man should have, about himself. Knowledge of the life-subject is imputable to the assured if he undertake for the truth of the "life's" statements, § 297. Fits, gout, vertigo.
False answer to a specific question avoids the policy, though the matter was not material, otherwise with a mere want of fulness, § 300.
- § 298. "Afflicted with disease." Consumption, spitting of blood, &c.
fits, diseases of liver or throat.
- § 299. Habit is a question for the jury. Means more than a single excess, but does not require daily and continuous use. Intemperance, opium; see also §§ 300-302.
- § 301. If death by intemperance is to avoid the contract, the death must be traced clearly to intemperance as *the proximate* cause. Neither intemperance combined with other causes, nor as a predisposing cause, will avoid the policy. If *delirium*

tremens with care and skill might not have been mortal, but by over-doses of morphine the man died, intemperance is not the proximate cause of death. If excess of liquor not taken by medical advice *impairs the health* or causes death though without *delirium*, the policy is void, though the insured was not habitually intemperate, or had even been habitually temperate up to the fatal debauch.

Medical Examination.

- § 303. Statements in regard to applicant's wealth, &c., made at such examination may be material.
If examiner misleads assured into making a wrong answer, or writes a false one without assured's knowledge, the company is estopped.
the applicant is not bound by the doctor's opinions.
if the company issues a policy knowing the examiner is the beneficiary, he will not have to prove the transaction fair and just.
- § 304. "Family physician," "medical attendance," &c.
a warranty that insured had not consulted a physician is broken by a consultation, though only for a cold.
- § 305. Age, misstatement fatal. Agent's knowledge estops company; so if applicant says he don't know and the agent makes his own estimate. Residence. Prison. Relationship.
- § 306. Occupation at the time must be stated, not that of the past; see also § 188 A.
but *all* occupations need not be stated; *one* is enough (*quære* as to fairness of this rule; the one omitted may be more hazardous than the one stated).

§ 295. **Good Health; Healthy Life; Tendency to shorten Life.** — In the early history of life insurance in England, and before the officers had acquired the art or indeed seen the necessity of hedging the insured about with warranties, in *Ross v. Bradshaw*,¹ it was held, by Lord Mansfield, that a warranty of good health meant simply that the applicant was in a reasonably good state of health, and was such a life as ought to be insured on common terms.² That it did

¹ 1 W. Bl. 312 A. D. 1760.

² [A warranty of the health of a third person does not require absolute freedom from illness or disease, but only that the person does not manifest symptoms of disease, and to the ordinary observation of a friend or relative, is well. *Grattan v. Mut. Life Ins. Co.*, 92 N. Y. 274. Sound health does not mean absolute freedom from infirmity, slight dyspepsia yielding readily to treatment and not known to be organic and excessive, is not inconsistent with such a representation. *Morrison v. Wisconsin O. F. Mut. Life Ins. Co.*, 59 Wis. 162. "Sound health" means freedom from *serious* disease, or grave, important, weighty trouble. A mere indisposition that does not tend to undermine the constitution, may exist, but Bright's disease is serious and dangerous, and inconsistent with sound

not mean that he was free from every infirmity, and in fact though he had one, the life might be a good one; and the fact that insured had several years before received in battle a wound in the loins which so affected him that he could not retain his urine or fæces, though not mentioned, was not inconsistent with a good insurable life. And about twenty years later, in *Willis v. Poole*,¹ where it appeared the insured was at times troubled with spasms from violent fits of the gout, though at the time of insurance in his usual state of health, Lord Mansfield said: "The imperfection of language is such that we have not words for every different idea, and the real intention of the parties must be found out by the subject-matter. By the present policy the life is warranted to some of the underwriters, *in health*; to others, *in good health*. And yet there is no difference in point of fact. Such a warranty can never mean that a man has not in him the seeds of some disorder. We are all born with the seeds of mortality in us. A man subject to the gout is a life capable of being insured, if he has no sickness at the time to make it an unequal contract." In *Watson v. Mainwaring*² there was a warranty that the insured was free from any "disorder tending to shorten life," while in fact the applicant was afflicted with a disorder of the bowels, which might proceed either from a defect of the internal organs, which would tend to shorten life, or it might proceed from dyspepsia, which would not, unless organic and excessive; and it was left to the jury to say whether it was dyspepsia or not, and, if so, whether it was organic and excessive. "All disorders," said Chambre, J., "have, more or less, a tendency to shorten life; even the most trifling, — corns may

health. *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306. A warranty of good health does not require perfect and absolute health. No definite rule can be laid down for the determination of the matter. It becomes usually a question for the jury on all the facts. When there are no reasonable grounds to suspect fraud, the questions and answers should be liberally construed in favor of the assured. *Maine Benefit Ass. v. Parks*, 81 Me. 79. See, for general discussion as to representations concerning health, *Hoffman v. Supr. Council of American Legion of Honor*, 35 Fed. Rep. 252 (Va.), 1888.]

¹ 2 Parke, Ins. 650.

² 4 Taunt. 763.

end in mortification. That is not the meaning of the clause. If dyspepsia were a disorder that tended to shorten life within the exemption, the lives of half the members of the profession of the law would be uninsurable." A disease tending to shorten life is one which has a continuing tendency, and not stating one which might or might not have produced that result is no concealment.¹ Of course if there is no warranty the insurers take every risk, where there is no fraud, as by misrepresentation or concealment.² "Good health" does not import a perfect physical condition. The epithet "good" is comparative, and does not ordinarily mean that the applicant is free from infirmities. Such an interpretation would exclude from the list of insurable lives a large proportion of mankind. The term must be interpreted with reference to the subject-matter and the business to which it relates. Slight troubles, not usually ending in serious consequences, and so unfrequently that the possibility of such result is usually disregarded by insurance companies, may be regarded as included in the term "good health."³ Good health means apparent good health, without any ostensible, or known, or felt symptom of disorder, and does not exclude the existence of latent unknown defects.⁴ The fact that death may ensue, and in fact does unexpectedly ensue in the particular case, from one of these slight troubles, or from the disease which the applicant has represented that he did not have nor never had, is of little importance.⁵ But a predisposition to a disease, — dyspepsia, for instance, — of such a character and to such a degree as to seriously affect the health and to produce bodily infirmity, is incompatible with a warranty of good health.⁶

¹ *Rose v. Star Ins. Co.*, 2 Irish Jurist, o. s. 206.

² *Stackpole v. Simon*, 2 Parke, Ins. 648.

³ *Peacock v. N. Y. Life Ins. Co.*, 20 N. Y. 293, affirming s. c. 1 Bosw. (N. Y. Superior Ct.) 338.

⁴ *Hutchinson v. Nat. Loan Ass. Soc.*, 7 Ct. of Sess. (Scotch) 2d ser. 467 ; s. c. 2 Big Life & Acc. Ins. Cas. 444.

⁵ *Watson v. Mainwaring*, 4 Taunt. 763 ; *Fahrenkrug v. Electric &c. Ins. Co.*, 68 Ill. 463. See also *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564.

⁶ *New York Life Ins. Co. v. Flack*, 3 Md. 341.

The fact, however, that some six months or a year previous to the insurance the applicant had suffered from dyspepsia while afflicted with an abscess is not conclusive evidence of a breach of warranty that he was not "subject to dyspepsia."¹ Nor is the fact that a man was pardoned out of the State prison on the ground that he had had hemorrhage of the lungs conclusive evidence that some months afterwards he had, as a disease, consumption, hemorrhage of the lungs, or spitting of blood.² A "healthy life" is a good life, one that would be taken at common rates; and one which would be charged higher than the usual rate of premium is not a healthy life.³ And a "drunken fellow" is not a good life.⁴ Equivocation in the answers touching health is of course as fatal as falsehood.⁵ [Where the questions were, "State *so far as you know* what was the age at death, cause of death, &c., of each of the following persons if deceased. What is the age and present state of health of each of them if now living? Are you now in good health and is your health usually good?" it was held that "so far as you know" did not qualify the last question, and as the answers were made warranties any falsity in fact in the answer to the last question would avoid the policy.⁶]

§ 296. **Serious Illness; Serious Injury; Tendency to shorten Life; Local Disease.** — The ordinary question whether the applicant has ever had any serious illness — as the word "serious" is a relative term, involving a question of degree, and it being certain that there are all degrees of illness, from the slightest, about which no concern is felt by any one, to the most aggravated, attended by the most alarming developments and the most serious consequences, about which there is everywhere the highest degree of concern, and as

¹ World, &c. Ins. Co. v. Schultz, 73 Ill. 586.

² Equitable Life Ins. Co. v. Patterson, C. Ct. (Mass.) 10 Ins. L. J. 384.

³ Brealey v. Collins, 1 You. 317; Ross v. Bradshaw, 1 W. Bl. 312.

⁴ Weskett, Ins. 335. In Taylor's Medical Jurisprudence may be found many valuable suggestions on the subject of representation as to health and disease and personal habits, with references to some cases not elsewhere reported. Phila. ed. 1866, 738 *et seq.*

⁵ Smith v. Aetna Life Ins. Co., 49 N. Y. 211.

⁶ [Mayer v. Equit. Reserve Fund L. Ass., 49 Hun, 336.]

even a disease regarded in its course as of the most trivial in its character may be followed by the most serious results — seems to be a question of opinion, the expression of which should be based upon intelligence and good faith. Nor does it include the ordinary malarial diseases of the neighboring country, which yield readily to medical treatment, and when ended leave no permanent injury to the physical system; but refers to those severe attacks which often leave a permanent injury and tend to shorten life, and which might be fairly regarded as likely to influence the insurers in determining whether they would insure.¹ [Excessive drinking of liquor is a violation of a warranty that the insured “will not practise any pernicious habit that obviously tends to shorten life.”²] Whether the injury is serious or not depends as much upon the impression produced at the time when it happened as upon its history and consequences.³ What one may call serious another might not; and where there is no test furnished by the insurers by which the applicant can know what serious illness means, his failure to mention one which he does not regard as serious works no forfeiture of the policy, though in fact the illness not mentioned was a serious one.⁴ A “serious illness” must be one which permanently impairs the constitution and renders the risk more hazardous.⁵ So, if the inquiry be as to the prior existence of disease having a tendency to shorten life, or rendering an assurance upon it more than usually hazardous. An honest belief in the truth of his answer is all that is required of the applicant.⁶ He may have had repeated attacks of disease,

¹ *Holloman v. Life Ins. Co.*, 1 Woods (U. S. C. Ct.), 674.

² [*Schultz v. Mut. Life Ins. Co.*, 10 Ins. L. J. 171, 2d Cir. (N. Y.) 1881; *Brockway v. Mut. Benefit Life Ins. Co.*, id. 762.]

³ *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222. And see *post*, § 539.

⁴ *Hogle v. Guardian Life Ins. Co.*, 6 Rob. (N. Y. Superior Ct.) 567; *Holloman v. Life Ins. Co.* (C. Ct.), 1 Woods, 674.

⁵ *Illinois Mason's Soc. v. Winthrop*, 85 Ill. 537. See also *ante*, §§ 193, 210.

⁶ [Where the applicant was required to state whether he had had certain diseases, and he replied that he had not, the court held upon examination of the whole policy that the intent was only to require good faith, and that although the insured might have had one or more of the diseases, — scrofula, asthma, and consumption, in this case, — yet if at the time of application he did not know or believe that he had ever been afflicted with either of them in a sensible, appre-

but if he does not know or have reason to believe that they come within the range of the inquiry, his failure to answer is immaterial, even though in point of fact they had a tendency to shorten life and to increase the hazard of the risk.¹ In such cases the rule seems to be that if the inquiry call for an answer which involves a matter of opinion, the applicant is answerable only for the honesty of his opinion, although the answer be untrue in fact. So, where it was untruly stated that the party had not had rupture.² And substantially the same rule was laid down in *Hutchinson v. National Loan Assurance Society*,³ where the inquiry was whether any material circumstances touching health or habits of life with which insurers ought to be made acquainted was withheld, and it was decided that the answer was only a warranty to the extent of the knowledge and reasonable belief of the in-

ducible form, the policy was not avoided. *Moulton v. American Life Ins. Co.*, 111 U. S. 339, 340. It has been held, however, that if the plaintiff has Bright's disease so well defined as to cause functional derangement, the policy is void whether the plaintiff knew of the disease or not. An ailment, however, which produces no functional disorder, and of which the person affected is unconscious, can hardly be called a disease within the meaning of an insurance contract. *Continental Life Ins. Co. v. Yung*, 113 Ind. 159. In construing the question "Have you had any . . . open sores, lumps, or swellings of any kind, . . . or any malformation, illness, or injury," sores must result from functional derangement and not from wounds, and whether any injury was of so slight a character as to be unworthy of mention as beyond the reasonable contemplation of the parties is a question for the jury. *Home Mut. Life Ass. v. Gillespie*, 110 Pa. St. 84.]

¹ "In the argument," said the court, in *Jones v. Provincial Ins. Co.*, 3 C. B. n. s. 65, "we were referred by the defendant's counsel to several authorities, — amongst others, *Lindeau v. Desborough*, 8 B. & C. 586, — establishing the proposition, which, as a rule, is indisputable, that it is the duty of a party effecting an insurance on life or property to communicate to the underwriters or other insurer all material facts within his knowledge touching the subject-matter of insurance, and that it is a question for the jury whether any particular fact was or was not material to be communicated. It is, however, equally clear that the underwriters may in any particular case limit their right in this respect to that of being informed of what is in the knowledge of the assured, not only as to its existence in point of fact but as to its materiality; and in our opinion that is the effect of the limited declaration required in the present case as to disorders or circumstances tending to shorten life or to render an insurance upon the life insured more than ordinarily hazardous."

² *Life Association v. Foster*, 11 Ct. of Sess. Cas. 2d ser. 351, an elaborate and well-considered case; *ante*, § 175.

³ 7 Ct. of Sess. Cas. 2d ser. (Scotch) 467; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52; 2 Ins. L. J. 839.

sured. "A disease requiring confinement" seems to be one calling for the attendance of a physician.¹ And it has been held as matter of law that tubercular affection of the lungs, or tubercles upon the lungs, or tubercles on the brain, or consumption, either of them constitutes "local disease."² But generally whether a disease or injury is in fact one, or is serious, slight, local, or otherwise qualified, or not, will certainly, if there be any discrepancy in the testimony or doubt as to its meaning, be a question for the jury.³ Where the inquiry is whether the life insured has had "insanity, scrofula, &c.," of a hereditary character, or "other hereditary disease," the word "hereditary" qualifies the several specified diseases.⁴ [In a case where it was provided that any untrue or fraudulent statements in the application should vitiate the policy, it appeared that in answer to the question whether certain of his relatives had any hereditary disease, the applicant, A., said, "No hereditary taint of any kind in family on either side of house, to my knowledge." The company proved that an uncle of A. had been insane, and died in an insane asylum about twenty years before the application. The jury were instructed to find for the plaintiff, and the United States Supreme Court held the instruction right. The company was bound to prove not only B.'s insanity, but that it was hereditary, and that both facts were known to A. when he answered the question.⁵ So when the assured stated that his relations had not been afflicted with

¹ Cazenove v. Brit. Eq. Ass. Co., 6 C. B. N. S. 437.

² Scoles v. Universal Life Ins. Co., 42 Cal. 523.

³ Southern Life Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 222. See also *ante*, § 187; Boos v. World, &c. Ins. Co., 64 N. Y. 236; Moulor v. American Life Ins. Co., 101 U. S. 708; Mutual Life Ins. Co. v. Snyder, 93 id. 393; Manhattan Life Ins. Co. v. Francisco, 17 Wall. (U. S.) 672; Watson v. Mainwaring, 4 Taunt. 763; *ante*, § 295; Moore v. Connecticut, &c. Ins. Co., Sup. Ct. (Conn.), reversing s. c. 3 Ont. Ct. of App., Ontario Dig. Insurance addenda, 1880; Newton v. Mutual Ben. Life Ins. Co., 76 N. Y. 426; Trefz v. Knickerbocker Life Ins. Co., C. Ct. (N. J.), 6 Ins. L. J. 850; Conover v. Massachusetts Ins. Co., 3 Dill. C. Ct. (Minn.) 224; *post*, § 581.

⁴ Newton v. Mutual Benefit Life Ins. Co., 76 N. Y. 426; Peasley v. Safety Deposit Company, 15 Hun (N. Y.), 227; Sinclair v. Phoenix Life Ins. Co., C. Ct. (Minn.) 9 Ins. L. J. 523; North Western Life Ins. Co. v. Gridley, 100 U. S. 614; Southern Life Ins. Co. v. Wilkinson, 53 Ga. 536.

⁵ [Insurance Co. v. Gridley, 100 U. S. 614, 616, 1879.]

insanity, it was held that proof of a mere temporary case of insanity in one of them was not a defence, it must appear to have been constitutional and hereditary in its nature.¹ Whether or not sunstroke and pneumonia are "serious diseases" is for the jury, when expert evidence conflicts.²

§ 297. **Subject to or afflicted with Disease.** — And the same rule is applicable to inquiries whether the applicant has been afflicted with any particular disease or symptoms of disease. He is bound to answer in good faith and according to his knowledge, — that knowledge which a man of ordinary intelligence ought to have, and in law is presumed to have, touching matters relating to his own physical condition and history. Though some of the cases make use of language strong enough to require that he must answer truthfully at his peril, without regard to the applicant's knowledge of, or reason to believe, the truth of the fact as stated or omitted, yet, as we have before seen,³ the facts in those cases did not require so extreme a ruling; and it may be doubted if, in view of the current of opinion, in a case presenting the exact point, the courts using this language will not be found in accord with the other authorities. Thus, where the statement in answer to an inquiry as to a particular disease or infirmity, as that the party has not been "afflicted with" or "subject to" fits, for instance, the interpretation to be put upon the clause is not that the person never had a fit accidentally, but that he was not at the time of the insurance a person habitually or constitutionally afflicted with fits, or a person liable to fits from some peculiarity of temperament, either natural or contracted, from some cause or other.⁴ [A false statement by the insured that he never had "vertigo" is not material, if it was merely a temporary result of in-

¹ [Westover v. Aetna Life Ins. Co., 2 How. Pr. N. S. 163.]

² [Boos v. World Mut. Life Ins. Co., 6 T. & C. 364, 367.]

³ *Ante*, §§ 202-205.

⁴ Chattock v. Shawe, 1 Mood. & Rob. 498; World, &c. Ins. Co. v. Schultz, 73 Ill. 586; Sinclair v. Phoenix, &c. Life Ins. Co., C. Ct. (Minn.) 9 Ins. L. J. 523; *ante*, § 295. Otherwise, if the question be whether he "ever had" fits. Fletcher v. Aetna Life Ins. Co., Supreme Ct. Montreal, 4 Ins. L. J. 236; France v. Aetna Life Ins. Co., C. Ct. (Pa.) 2 Ins. L. J. 567; 94 U. S. 561.

digestion.^{1]} So, where the question was whether the applicant had ever been afflicted with the gout. "As to the first answer," said Cockburn, C. J., in his charge to the jury, in *Fowkes v. Manchester and London Life Insurance Company*,² "to the question whether he had ever been afflicted with the gout, no doubt it must be considered with some reasonable latitude, and the answer would not be false merely because he had had some symptoms which an experienced medical man might see indicated the presence of gout in the system. You will probably consider whether there was gout in a sensible, appreciable form; and in considering that question you will bear in mind that the medical man himself described the only attack which preceded the policy as the slightest possible case of gout, and that there is no positive evidence that the deceased knew that he had the gout." Where the insurance is upon the life of a third party, the knowledge and good faith of the third party will be imputable to the insured, if he undertake for the truth of the statements of the "life."³

§ 298. **Afflicted with Disease.** — In *Vose v. Eagle Life and Health Insurance Company*,⁴ the questions were whether the applicant or any of his family had been afflicted with pulmonary complaints, consumption, or spitting of blood, or whether he was afflicted with any disease or disorder, and the court thought he ought to have stated the "symptoms of consumption which he had, and which he knew he had, and which he had had for five months previous," in answer to the last interrogatory. But whether this were so or not, the denial that he had been afflicted with pulmonary complaints, consumption, or spitting of blood, under such circumstances, whether regarded as a warranty or representation, avoided

¹ [Mutual Benefit Life Ins. Co. v. Daviess' Ex'x, 87 Ky. 541.]

² 3 F. & F. 440.

³ *Duckett v. Williams*, 2 Carr. & Marsh. 348; *Mutual Benefit Life Ins. Co. v. Cannon*, 48 Ind. 264; *Forbes v. Ed. Life Ass. Co.*, 10 Ct. of Sess. Cas. (Scotch) 451. In *Duckett v. Williams* it was held that a warranty by the assured, that the life is a good one, cannot be avoided by a want of knowledge and proof of good faith. But see *Life Ass. v. Foster*, 11 Ct. of Sess. Cas. 2d ser. 351; *ante*, §§ 202-204; *Archibald v. Mut. Life Ins. Co.*, 38 Wis. 542.

⁴ 6 Cush. (Mass.) 42.

the policy. In a later case, in the same State, where the question was whether the insured had been "subject to or at all affected by spitting of blood,"¹ the appellate court held the following language:—

"The court instructed the jury that the repeated spitting of blood, accompanied by a cough, was so far an indication of disease, that if the applicant had suffered from it he was bound to have so stated; that if he was subject to occasional spitting of blood, accompanied by a cough, he was bound to have stated that fact, and that the same was true if he had spit blood in a single instance, if recent, and such as to excite apprehension in his own mind that it was the result of disease.

"Considering the various forms and degrees in which the spitting of blood with a cough may manifest itself, the uncertainty as to its source and cause, and the character of the facts which the testimony in this case tended to prove, we cannot say that the rulings of the court ought to have gone further than this in favor of the propositions of the defendant. The mere raising of a small quantity of blood with a cough in a single instance is not necessarily an indication of disease or a material circumstance, so that such an occurrence, however slight, at any time during the previous life of the applicant, would make his answer such a misrepresentation as to require that the court should so declare it as a matter of law."

And in the same case, on exceptions after another trial, the question being whether the insured had truly answered the same question relative to "bronchitis," the court say: "It was for the jury to decide whether 'chronic bronchitis' or 'bronchial difficulty,' or any other bodily affection or condition to which the assured was found by them to have been subject, amounted to bronchitis, consumption, disease of the lungs, or some other of the infirmities stated in the application, and relied on by the defendants; and whether the spitting of blood by him, if proved to have taken place, was

¹ *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381. See also *Hartigan v. International Life Ass. Co.*, 8 L. C. Jour. 203.

under such circumstances as to indicate disease in his throat, lungs, air passages, or other internal organs." So where the application states that the insured had not had "any spitting of blood, consumptive symptoms," &c., the "spitting of blood" must be taken to mean a symptom of disease tending to shorten life, the mere fact being of no significance, as it may happen from the mere pulling a tooth. Yet the court were of the opinion that if a single instance of spitting of blood was the "result of the disease called spitting of blood," it ought to be stated.¹ If he had "spit blood from his lungs, no matter in how small quantity, or even had spit blood from an ulcerated sore throat, he would be bound to state it;" and one of the learned judges, Pollock, C. B., went so far as to say that "one single act of spitting of blood" ought to have been mentioned, though he had just before said that the expression "spitting of blood" no doubt meant the *disorder* so called, whether proceeding from the lungs, the stomach, or any other part of the body, leaving it fairly to be inferred that he intended to go no further than his brethren in respect to the single act.² In *Fried v. Royal Insurance Company*, the question tried was whether the "spitting of blood" proceeded from the lungs or from the stomach, under a representation by the insured that he was not afflicted with spitting of blood or disease of the lungs.³ The propriety of submitting the question in this form to the jury seems not to have been contested in either of the appellate courts, the Supreme Court,⁴ or the Court of Appeals.⁵ [In answer to the questions, "Has the party had any of the

¹ [But in Michigan it was more sensibly held that a mere temporary ailment, as slight lung trouble, and spitting of blood, that does not undermine the constitution, will not affect a policy issued on an application that declares that the plaintiff had never been afflicted with the disease of asthma or blood spitting. *Pudritzky v. Knights of Honor*, 76 Mich. 428.]

² *Geach v. Ingall*, 14 Mees. & Wels. 95. The court will, in its discretion, order the defendant to file a bill of particulars, setting forth when and where the facts alleged in defence occurred. *Dwight v. Germania Life Ins. Co. (N. Y.)*, 10 Ins. L. J. 295.

³ So stated in *Bliss on Insurance*, p. 159.

⁴ 47 Barb. (N. Y.) 127.

⁵ 2 Ins. L. J. 126.

following complaints . . . (16) pneumonia, . . . spitting or raising of blood, (20) any disease of the lungs?" the assured said "No," and it was held that there was no warranty that the assured never had spitting or raising of blood, but only that he never had it in such form as to constitute a disease.¹(a)] Fainting fits are not "epileptic or other fits," and

¹ [Dreier v. Continental Life Ins. Co., 24 Fed. Rep. 670 (Ind.) 1885.]

(a) The applicant's answers as to his previous health are warranties and material to the risk. *Hambrough v. Mutual L. Ins. Co.*, 72 L. T. 140; *Maier v. Fidelity M. L. Ass'n*, 78 Fed. Rep. 566; *Nelson v. Nederland L. Ins. Co.* (Iowa), 81 N. W. 807; *Petitpain v. Mut. Reserve Fund L. Ass'n* (La.), 27 So. 113; *Aloe v. Mutual Reserve Fund L. Ass'n*, 147 Mo. 561; *Reilly v. Chicago Guaranty Fund L. Society*, 75 Minn. 377; *Boland v. Industrial B. Ass'n*, 74 Hun, 385; *Redmond v. Industrial B. Ass'n*, 78 Hun, 104; *Sternman v. Met'n L. Ins. Co.*, 63 N. Y. S. 674; *Jerrett v. John Hancock M. L. Ins. Co.*, 18 R. I. 754. But his warranty is, not that the statements in his application are absolutely correct, but that he has not consciously or wilfully falsified. *Keatley v. Travellers' Ins. Co.*, 187 Penn. St. 197. Some diseases or bodily conditions are of such a nature that the question whether they increase the risk of loss is for the jury. See *Freeman v. Mercantile Mut. Acc. Ass'n*, 156 Mass. 351; *Dorey v. Met'n L. Ins. Co.*, 172 Mass. 234; *Life Ins. Clearing Co. v. Altshuler*, 55 Neb. 341. Rupture is said to be of that class. *Levie v. Met'n Ins. Co.*, 163 Mass. 117; see *Travelers' Ins. Co. v. Murray*, 16 Col. 296. So of temporary heart prostrations, especially when the evidence is conflicting. *Smith v. Met'n L. Ins. Co.*, 183 Penn. St. 504; *Commercial Travellers' Mut. Acc. Ass'n v. Fulton*, 79 Fed. Rep. 423. So of "head-aches": see *Mutual L. Ins. Co. v. Simpson*, 88 Texas, 333; *Petitpain v. Mut. Reserve Fund L. Ass'n* (La.), 27 So. 113; of "fainting spells": see *Manufacturers' Acc. Ind. Co. v. Dorgan*, 58 Fed. Rep. 945, and of "bronchial

affections," or the "spitting of blood": see *Mutual Benefit L. Ins. Co. v. Robison*, 58 Fed. Rep. 723; *White v. Provident S. L. Ass. Society*, 163 Mass. 108; *March v. Met'n L. Ins. Co.*, 186 Penn. St. 629; *Smith v. Northwestern Mut. L. Ins. Co.* (Penn.), 46 Atl. 426. On the other hand, there are conditions and diseases of a nature which requires it to be held, as matter of law, that a misrepresentation as to them is one as to a matter which increases the risk of loss. That the applicant was addicted to the excessive use of intoxicating liquors was held to be such matter in *Rainger v. Boston M. L. Ass'n*, 167 Mass. 109. Consumption developed in the applicant or his ancestors is also of the latter class. *Brown v. Greenfield L. Ass'n*, 172 Mass. 498; *March v. Met'n L. Ins. Co.*, 186 Penn. St. 629; *Jerrett v. John Hancock M. L. Ins. Co.*, 18 R. I. 754; *Knights of Pythias v. Rosenfeld*, 92 Tenn. 508; *Met'n L. Ins. Co. v. Dempsey*, 72 Md. 288.

Under the statute of Iowa providing that when the applicant is declared by the company's medical examiner to be a fit subject of insurance, the company shall be estopped to deny that he was in the required condition of health, unless the policy was procured by fraud or deceit, false answers as to health by the insured cannot be set up in the absence of evidence that the physician was deceived or was in collusion with insured. *Weimer v. Economic Life Ass'n* (Iowa), 79 N. W. 123. The parties cannot contract as to the statements which shall be material when a statute provides that they must be material in order to affect the risk, but the materiality of the state-

are consistent with the truth of a representation that the applicant is not subject to "epileptic or other fits."¹ And where one is asked whether he has had disease of the liver or throat, this means something more than a temporary ailment which indicates no constitutional vice, and leaves no permanent consequences.² [The length of time before the application that an attack of apoplexy occurred may be material, in view of the fact that the longer the person lives without a new attack the less likelihood there is of further trouble.³]

§ 299. **Habits; Intemperance; Opium-eating.** — A warranty that the insured is of sober and temperate habits means that at the time of insurance, and for such a reasonable time prior thereto as would allow of a man evincing a habit, the insured was a temperate man. The question is not whether he was intemperate to such a degree as to injure his health. The insurers have a right to protect themselves by guarding against the risks of pernicious habits; and if one who stipulates for habitual sobriety and temperance is an habitual drunkard, he loses his protection under such a warranty, though his health may be good and his constitution unimpaired.⁴ [The questions "Has the party ever been intemperate?" "Is he now of temperate habits?" refers to *habits* and not to occasional practices.⁵ If the ordinary habits of a person are temperate, his representation that he was a man of temperate habits is not untrue, though from excep-

¹ *Shilling v. Accidental Death Ins. Co.*, 1 F. & F. 116.

² *Cushman v. United States Ins. Co.*, 70 N. Y. 72; *Eisner v. Guardian Life Ins. Co.*, C. Ct. (Mo.) 5 Ins. L. J. 613.

³ [*Webster v. Mutual Relief Soc.*, 20 U. S. R. 347.]

⁴ *Southcombe v. Merriman*, Carr. & Marsh. 286.

⁵ [*Union Mut. Life Ins. Co. v. Reif*, 36 Ohio St. 596.]

ments must be determined judicially. Even when statements as to diseases in the application are material, the insured is not obligated to remember all his temporary ailments and functional diseases which did not permanently impair his health. *Fidelity Mut. L. Ass. v. Miller*, 92 Fed. Rep. 63. When the

application, the by-laws, and the policy of an assessment association made the application a warranty, an untrue answer as to health avoids the policy, though not material to the risk. *Aloe v. Mut. Reserve Fund L. Ass'n*, 147 Mo. 561.

tional overindulgence he may have had the *delirium tremens*.¹ I doubt if these rulings are fair. A man who drinks in such a way that he has had the *delirium tremens*, whether as the result of a single debauch or otherwise, is liable to have another debauch and another attack. He is not a temperate man in the true sense and spirit of the question, who is open to such excess, nor does his answer disclose what the company manifestly desires to know, viz. the danger to his life by reason of his appetite for drink. *Literally* it is true that one is not less of intemperate habit because he is sober now and then, and so the general habit of a man may be temperate and yet he may at times be drunk; but the spirit should govern the letter, and the insured should be held to state facts so manifestly germane to the motive of the question, if they are near enough in time to be material and in his memory. Technicalities and literalities should not protect the insured any more than the company. Except in *very* clear cases, the question if habitual intemperance existed is for the jury.² And it is error to charge that a continuous and *daily* use of liquor is necessary to constitute a habit.³ Where it was agreed that if the habits of the insured should change so as to increase the risk, the policy should be void, and he became intemperate during the year before his death, but medical opinion was divided on the question of the materiality of the change, it was held, that the change in its nature increased the risk.⁴ Especially have the insurers a right to know that the insured had had *delirium tremens* within one year prior to the issuing the policy, and that during the year prior to that he had been attended by his physician on account of the effects of excessive drinking.⁵ In Scotland it is held that the habit of using opium, laudanum, or spirituous liquor to such an extent as to impair the health is one that ought to be disclosed.

¹ [Insurance Co. v. Foley, 105 U. S. 350, 354.]

² [Northwestern Ins. Co. v. Muskegon Bank, 122 U. S. 501.]

³ [Union Mut. Life Ins. Co. v. Reif, 36 Ohio St. 596.]

⁴ [Boyce v. Phoenix Mut. Ins. Co., 14 Can. S. C. R. 723 (three judges dissenting).]

⁵ Hutton v. Waterloo Life Ass. Soc., 1 F. & F. 735.

And a policy was held void for non-communication of this fact, the applicant having stated that he was in perfect health, and a negative answer by both the medical and other referees to the question whether "they knew any reason why an insurance on the life would be more than usually hazardous" having been given.¹ If the agreement is that at the time of the insurance the insured is a man of sober and temperate habits, and that is not the fact, it is no answer to say that the habits were not such as to injure the health.² Addicted to the excessive use of intoxicating liquor means habitual excessive use, not occasional. There is no sharp division between ebriety and inebriety, what is habitual and what occasional, what is temperate and what is intemperate. The words, however, are not technical, and it is for the jury to say whether the circumstances bring the insured within either category.³(a) Habits of intemperance acquired sub-

¹ *Forbes v. Ed. Life Ass. Co.*, 10 Ct. of Sess. Cas. (Scotch) 1st ser. 451.

² *Southcombe v. Merriman et al.*, Carr. & Marsh. 286; *McGinley v. United States Life Ins. Co.*, 77 N. Y. 495; affirming s. c. in the C. C. P., 7 Ins. L. J. 791; *Fox v. Pennsylvania, &c. Ins. Co.*, Dist. Ct. Phila., 4 Big. Life & Acc. Ins. Cas. 458; *Furniss v. Mut. Ins. Co.*, Supr. Ct. (N. Y.) 11 Repr. 98.

³ *Mowry v. Home Ins. Co.*, 1 Big. Life & Acc. Ins. Cas. 698; 9 R. I. 346; *Swick v. Home Life Ins. Co.*, 2 Dill. C. Ct. 160; *John Hancock, &c. Ins. Co. v. Daly*, 65 Ind. 6; *Holterhoff v. Mutual Benefit Life Ins. Co.*, 3 Am. Law Record, 272; s. c. 4 Big. Life & Acc. Ins. Cas. 395. In this case the court distinguished between periodical "sprees" and habitual intemperance, unless the "sprees" were frequent and aroused an uncontrollable appetite while they continued, in which case the habit of intemperance might be said to exist; and Tilden, J., thus defined "habit:" "A habit . . . is a disposition or condition of the mind or body, — a tendency or aptitude for the performance of certain actions acquired by custom or frequent repetition of the same acts. Habit is that which is held or retained, — the effect of custom or frequent repetition. Hence we speak of good habits or bad habits." See also *Union Ins. Co. v. Reif (Ohio)*, 10 Ins. L. J. 428.

(a) See *Hanna v. Conn. Mut. L. Ins. Co.*, 150 N. Y. 526; *Janneck v. Met'n L. Ins. Co.*, 162 N. Y. 574; *Masons' Union L. Ins. Ass'n v. Brockman*, 20 Ind. App. 206; *Waters v. Supreme Conclave Knights of Damon*, 105 Ga. 151; *Ins. Co. v. Lauderdale*, 94 Tenn. 635; *Mutual L. Ins. Co. v. Thomson*, 94 Ky. 253; *Union Central L. Ins. Co. v. Lee (Ky.)*, 47 S. W. 614. The habit

of using intoxicating liquors to excess increases the risk of loss in life insurance, and a misrepresentation as to such habit by the assured in his application for insurance avoids the policy, under *Mass. St. 1895, c. 271*, whether he did or did not actually or knowingly intend to deceive the insurer by such statement. *Rainger v. Boston Mut. L. Ass'n*, 167 Mass. 109. There must be a habit

sequent to the insurance, even though the cause of death, will not avoid the policy, unless expressly so stipulated.¹ And a declaration by the assured that he "does not now, nor will he, practise any pernicious habit that obviously tends to the shortening of life," as to the latter clause is a mere declaration, and not a covenant the violation of which will work a forfeiture of the policy.² And that the insured died from an injury received while intoxicated is immaterial,³ unless the policy provides to the contrary.⁴ But a man cannot truly be said always to have been sober and temperate, who, though usually of sober and temperate habits, occasionally indulges in drunken debauches, which sometimes terminate in *delirium tremens*.⁵ (a) And that one's habits were intemperate recently prior to the application is evidence of his habits at that time.⁶ And where such habits, "seriously

¹ Reichard v. Manhattan Life Ins. Co., 31 Mo. 518; Horton v. Equitable Life Ass. Soc. of the United States, C. C. P. (N. Y.) 1870; s. c. 2 Big. Life & Acc. Ins. Cas. 108.

² Knecht v. Mutual Life Ins. Co. (Pa.), 90 Pa. St. 118. But see *contra*, Holterhoff v. Mutual Life Ins. Co., *infra*.

³ *Ibid*.

⁴ Shader v. Railway, &c. Ins. Co., 5 T. & C. (N. Y.) 643.

⁵ Mutual Benefit Life Ins. Co. v. Holterhoff, 2 Cincinnati Sup. Ct. Rep. 379. But see John Hancock, &c. Ins. Co. v. Daly, *supra*.

⁶ Daly v. John Hancock Ins. Co., Sup. Ct. (Ind.), 8 Ins. L. J. 319.

of using alcoholic stimulants, and not a single or occasional use, to establish the falsity of an applicant's answer that he uses no such stimulants. Grand Lodge v. Belcham, 145 Ill. 308; Meacham v. New York State Mut. Ben. Ass'n, 120 N. Y. 237. The word "temperate," in a policy or application, refers to abstinence from excessive or injurious use, not to total abstinence. *Ibid*.; Chambers v. Northwestern M. L. Ins. Co., 64 Minn. 495. Impairment of health or death resulting from alcoholic stimulants, when taken in good faith under competent medical advice, was held not to violate a stipulation in a life policy against their use in Aetna L. Ins. Co. v. Ward, 140 U. S. 76; 123 id. 743. Knowledge of the insurer's secretary

that the applicant had taken the "Keeley cure" waives conditions in the policy as to intemperance, so far as such cure applies thereto. DeWitt v. Home Forum Benefit Order, 95 Wis. 305.

(a) See Provident Savings L. Ass. Society v. Llewellyn, 58 Fed. Rep. 940; Malicki v. Chicago Guaranty Fund L. Society (Mich.), 77 N. W. 690. When this ground is relied upon, the impairment of health caused by the use of intoxicating liquors must be serious and permanent. Aetna L. Ins. Co. v. Deming, 123 Ind. 384. The insurer has the burden to show that death resulted from this cause. Malicki v. Chicago Guaranty Fund L. Society, *supra*; Aetna L. Ins. Co. v. Hanna, 81 Texas, 487.

impairing the health, or inducing *delirium tremens*," acquired after insurance, are made a ground of forfeiture, evidence that he was a drunkard before, and that the amount which he drank both before and after was sufficient to impair his health, not amounting to evidence that his health was impaired or *delirium* induced by the subsequent intemperance, is inadmissible.¹

§ 300. **Same Subject; Distinction between Answer to Specific Question and a Want of Fulness in answer to a General Question.** — The same general questions as to health and habits came before the court in a case where certain of the questions were somewhat different in form from any of those we have been considering, — one, especially, calling for an answer whether the habits of the insured were uniformly and strictly sober and temperate, and it was held that the occasional use of intoxicating liquors by the insured did not make his answers untrue.²

¹ *Old Fellows Mut. Life Ins. Co. v. Rohkopp* (Pa.), 9 Ins. L. J. 787.

² *Swick v. Home Life Ins. Co.*, 2 Dill. C. Ct. (Mo.) 160. The case was tried before Dillon and Treat, JJ., and seems to have been carefully considered. In charging the jury the court used the following language: "The main defence upon the trial has been rested upon alleged misrepresentations by the assured in the application, respecting his health and his habits as to the use of alcoholic drinks. In the application the following questions were asked of Henry, and answered by him: 6. 'Is your health good (and, as far as you know) free from any symptoms of disease?' Answer: 'Yes.' 9. 'Are your habits uniformly and strictly sober and temperate?' Answer: 'Yes.' 10 (a). 'Have you ever been addicted to the excessive or intemperate use of any alcoholic stimulant or opium?' Answer: 'No.' 10 (b). 'Do you use habitually intoxicating drinks as a beverage?' Answer: 'No.' By the terms of the contract between these parties, these answers are warranted to be true; and it is agreed in the policy that if these answers are untrue or deceptive in any respect, the policy shall be void and of no effect. The parties have the right thus to agree, and are bound by their agreement, and hence the importance of understanding what the questions asked were, and the answers given thereto. This is the more important, because, if the answers given are untrue, the policy is avoided, although there are no intentional or fraudulent misstatements, and although the party's habits as to intoxicating drinks did not in fact cause or even accelerate his death. We remark to you, first, that the questions as to health and habits in respect to intoxicating drinks will be taken to mean what the words employed by those questions usually and commonly mean. They are not words of art, but words of every-day meaning; and this is a contract not between professional men or lawyers, but a contract that these companies profess to make with the world, and when they ask a man if his health is good, there is no mystery in the question. If you find from the evidence that at the date of the application Henry's health was not good, or

§ 301. Death by Intemperance ; Proximate Cause — If a policy is by its provisions to be void when the insured shall

if Henry knew of any symptom of disease which he did not disclose, then there can be no recovery on the policy. If you find the fact to be, as the company contends it was, that Henry's general health was at the time impaired by exposure, or from the use of intoxicating liquors, or from any other cause, there can be no recovery on the policy. But if it was shown to the company, or its agent taking the risk, that the assured had, as certified by the family physician to the company, been sick a few days before, and if this was a mere temporary illness which was over at the time, and was disregarded by the company, or its agent taking the risk, as not being within the purview of the question asked of the assured in this respect, the policy would not be thereby avoided. Now as to the question respecting intoxicating liquors. These relate to the habits of the party. The applicant stated that he had never been addicted to the excessive or intemperate use of alcoholic stimulants. This is not a statement that he had never been addicted to the use of intoxicating liquors at all, but a statement that he had never been addicted to the excessive and intemperate use of them; and it is untrue if Henry had, and only in case he had, been addicted to the excessive or intemperate use of alcoholic stimulants. The application, in answer to other questions, stated that his habits were uniformly and strictly sober and temperate, and that he did not habitually use intoxicating drinks as a beverage. These questions and answers, you will perceive, relate to the habits of the party in that respect. If the company did not intend to insure any person who used intoxicating liquors at all, it would be very easy to ask such a question. But they have not done so. The occasional use of intoxicating liquors by the applicant would not make these answers untrue; nor would they be rendered untrue by any use of intoxicating drinks which did not make his habits those of a man not uniformly and strictly sober and temperate, or which did not amount to habitual use of such drinks as a beverage. It is your province to decide from the evidence whether the assured was or was not, at the time the application was made, a man whose habits were uniformly and strictly sober and temperate, or whether he did or did not habitually use intoxicating stimulants as a beverage; and if you find his answer to either question to be untrue, there can be no recovery on this policy, although, as above remarked, he did not intentionally make false answers, and although those habits did not in fact cause, hasten, or contribute to the death. We have been asked by the defendant to instruct you that if the answers as to the health and habits are not *full*, correct, and true, the plaintiff cannot recover, even though the failure to make full answers was unintentional. The application referred to and made part of the policy contains the provision: 'The undersigned does hereby covenant . . . that the preceding answers and this declaration shall be the basis of the policy; that the same are *warranted* to be full, correct, and true, and that no circumstance is concealed, withheld, or unmentioned in relation to the past or present state of health, habits of life, or condition of the said party whose life is to be assured, which may render an insurance on his life more than usually hazardous, or which may affect unfavorably his prospects of life;' and that 'if the foregoing answers and statements be not in all respects full, true, and correct, the policy shall be void.' The policy repeats or adopts this provision. Now a distinction is to be taken, we think, between untruthful answers to specific questions and the mere failure to make full answers. Such failure, under these provisions, to defeat the policy must relate to some circumstance which might render an insurance on his life more than usually hazardous, or which

die by reason of intemperance in the use of intoxicating liquor, it must appear that intemperance is the paramount and proximate cause of death. It is not enough that the insured may have been addicted to habits of intemperance, indulged in for a considerable period prior to his death. Such habits doubtless have a tendency to shorten life, but if on this ground payment of a loss may be resisted, no insurance, though knowingly taken, upon the life of an intemperate man would be of any value. To warrant such a defence, it should appear that intemperance was the cause of death, so recently prior to the death, and having such an obvious connection with it, that the death may be clearly traceable to it, and fairly be said to have been produced by it. If intemperance is only a contributory cause, and not the sole, or at least paramount, cause of death, the defence cannot avail; as in actions for negligence, the plaintiff cannot recover unless it be shown that the negligence of the party to be charged is something more than a contributory cause of the injury. Neither intemperance combined with other causes, nor intemperance as a secondary, remote, and predisposing cause, even though it may have rendered the insured more susceptible to the attack and less capable of resisting the ravages of disease, the disease being the controlling and efficient cause of death, will avoid the policy.¹ The intemperance or intoxication must also be voluntary, and not in pursuance of the prescription of a physician, treating him in sickness, though such sickness may have

might affect unfavorably his prospects of life; while an untruthful or incorrect answer to the specific questions asked renders the policy absolutely void, though made in relation to a matter not material to the risk." See also *Wilkinson v. Union Mut. Ins. Co.*, 2 Dill. C. Ct. 570.

¹ *Miller v. Mutual Benefit Life Ins. Co.*, 31 Iowa, 216; *Holterhoff v. Mutual, &c. Ins. Co. (Cincinnati Supr. Ct.)*, 3 Am. L. Rec. 272; s. c. 4 Big. Life & Acc. Ins. Cas. 395. Some observations fell from Daly, J., in *Horton v. The Equitable Life Assurance Company of the United States* (N. Y. Ct. Com. Pleas, 1870, *ubi supra*), not entirely consistent with the doctrine stated in the text. But they were *obiter*, and perhaps not well considered. The point decided was that on an issue of the truth of a statement, the truth of which was warranted, that at the time the insurance was effected the insured had never been addicted to habits of intemperance, the fact that the death occurred from an injury received while intoxicated, and because of the intoxication, was irrelevant, — a decision which was no doubt correct. See *Watson v. Mainwaring*, 4 Taunt. 763; *ante*, § 295.

been caused by the voluntary excessive use of the prohibited article.¹ [If a policy is to be void if the insured becomes "so far intemperate as to impair health or induce *delirium tremens*," and the death was substantially caused by the excessive use of alcoholic stimulants, not taken for medical purposes or under medical advice, then the assured's health was impaired by intemperance within the meaning of the policy, although he might not have had the *delirium tremens*, and although he had not indulged in strong drink enough to become habitually intemperate.² And in another case it was held that if the insured died from a single debauch, continued for one or for ten days, he did become "so far intemperate as to impair his health," although he had, previously to his last illness, led a temperate, or even strictly abstemious life.³]

§ 302. **Death from Intemperance.** — In another action against the same company,⁴ substantially the same question again arose. The policy provided that the insurers should not be liable if the insured should "die by reason of intemperance from the use of intoxicating liquors." That the insured so died was set up in defence; and there was evidence to establish the defence, and that the insured had *delirium tremens* or *mania a potu*, caused by such intemperance, and that such disease is often fatal. It was also in evidence that morphine, amongst other medicines, was administered in large quantities to the insured by the physician called to take care of him, as a remedy. The plaintiff claimed that the treatment was improper, and that if the plaintiff had *delirium tremens*, the death of the insured resulted directly and immediately from the excessive amount of opium administered, and not from the disease. The defendants requested the court to rule that "if the assured, by intemperance caused by the use of intoxicating liquors, brought upon himself a disease, fatal in its nature, and a physician

¹ *Holterhoff v. Mutual Benefit Life Ins. Co.*, *supra*.

² [*Ætna Life Ins. Co. v. Davey*, 123 U. S. 739.]

³ [*Davey v. Ætna Life Ins. Co.*, 38 Fed. Rep. 650, 656 (N. J.), 1889.]

⁴ *Ranney v. Mutual Benefit Life Ins. Co.*, tried in the Circuit Court of the United States for the First Judicial District (Mass.), before Shepley, J., March, 1873.

was called in who, in good faith and with intent to cure, administered medicines which in fact contributed to, or even caused, the death of the insured," he could not recover. This instruction was refused, but the court did instruct the jury as follows: "The real question in this case is, whether intemperance from the use of intoxicating liquors was the cause of death. If the disease from which the insured was suffering was *delirium tremens* or *mania a potu*, or other disease resulting from intemperance from the use of intoxicating liquors, and that disease, though not necessarily mortal, yet from want of helpful application, or neglect of proper care or treatment, produced exhaustion or fever, and consequent death, the death would properly be considered as resulting from the intemperance, even if the disease were not so mortal in itself but that with good care and under favorable circumstances the insured might have recovered; yet if it became the cause of death by reason of the most efficacious mode of treatment not having been adopted, then the plaintiff would not be entitled to recover. If the death of the assured was caused by any drug administered to him in the course of medical practice for the purpose of cure, in sufficient quantity to produce death, and death was the effect of the drug and not of the disease, then, in such case, the death could not properly be considered as resulting from the intemperance in the use of intoxicating liquors, and the plaintiff upon that branch of the case would be entitled to recover." And the court further instructed the jury "that they were to consider whether the insured caused his own death by the use of intoxicating drinks, or whether the physician caused the death by the use of narcotic drugs; whether the death resulted from that alone, or whether the man was in a condition in which they failed to relieve him from the disease, and left the disease to cause the death itself; or whether it was of itself the active and immediate cause of the death, and he would have recovered but for that, — is a question of fact for your determination."¹

¹ See also *New York Life Ins. Co. v. Boiteaux* (Cincinnati Superior Ct.), 5 Big. Life & Acc. Ins. Cas. 437; s. c. 4 Am. Law Record, 1.

§ 303. **Materiality of Statements at the Medical Examination; Evidence; Agency.** — In a strongly contested case in New York, the question arose whether the examining physician might testify whether the statement made by the applicant, during that application, that he was a man of means, influenced his judgment upon the general question whether the applicant was afflicted with any disease tending to shorten life, and whether the life was one which he could recommend. This evidence was admitted, upon the ground that such a statement was material, and might properly influence the mind of the medical examiner, for the same reason that any statements, though not strictly relating to the risk, if they are calculated to determine the question in the mind of the insurer whether he will assume the risk or not, are material, and, if false, avoid the policy. The social relations, the pecuniary circumstances, the fact that others skilled in insurance had taken the same risk, and many other facts not having a direct bearing upon the risk itself, may, and doubtless often do, influence the judgment in determining whether to assume the risk.¹(a) The object of a physical examination of a person proposing to insure his life by a competent physician, it was observed by the court, is to ascertain whether he is laboring under, or is subject to, any disease or defect which may have the effect to shorten life. The inquiry involves an examination not only into the present state of the various organs and functions of the body, but into the tendency of these organs and functions to take on diseases as affected by habits of mind as well as of

¹ *Sibbald v. Hill*, 2 Dow, 263; *Anderson v. Fitzgerald*, 4 H. of Lds. Cas. 484.

(a) See *Patten v. United Life & Acc. Ins. Ass'n*, 133 N. Y. 450; *Cobb v. Covenant Mut. Benefit Ass'n*, 153 Mass. 176; *White v. Provident Savings L. Ass. Society*, 163 Mass. 108; *Brown v. Greenfield L. Ass'n*, 172 Mass. 498; *Finch v. Modern Woodmen of America*, 113 Mich. 646; *Smith v. Met'n L. Ins. Co.*, 133 Penn. St. 504; *Mutual L. Ins. Co. v. Arhelger* (Ariz.), 36 Pac. 895; *Aloe v. Mutual Reserve Fund L. Ass'n*, 147 Mo. 561; *Brady v. United L. Ins. Ass'n*, 60 Fed. Rep. 727; *Fidelity Mut. L. Ass'n v. Ficklin*, 74 Md. 172; *Providence L. Ass. Society v. Reutlinger*, 58 Ark. 528; *Germania L. Ins. Co. v. Lunkenheimer*, 127 Ind. 536; *O'Hara v. United Brethren Mut. Aid Society*, 134 Penn. St. 417; *Kelly v. Life Ins. Clearing Co.*, 113 Ala. 453; *Mutual Life Ins. Co. v. Nichols* (Tex. Civ. App.), 26 S. W. 998; *Stewart v. Equitable Mut. L. Ass'n* (Iowa), 81 N. W. 782.

body, temperament, tendency to disease from hereditary causes, and the occupation and condition in life of the subject. Of two persons of the same age and present bodily health, the one may present a risk entirely safe, the other unsafe. It is impossible to fix limits to the subject into which it is not only proper, but necessary, for an examining physician to inquire, in order to enable him to arrive at a conclusion upon which he can properly advise the acceptance or rejection. The fact that the applicant declares himself to be a man of means may affect his judgment in such case, and, if so, an answer to that question is material. The physician may therefore be properly inquired of if that statement affected his judgment in recommending the risk.¹ On the other hand, it has been held that where the medical examiner had testified that he had been influenced by the fact that the insured had spoken of his great powers of endurance, he could not be asked, on cross-examination, whether if he had known of a certain other fact touching his physical condition, several years previous, that would have influenced his judgment in recommending the risk.²

If the medical examiner, however, it being made his duty to explain, mislead the applicant into untrue statements as to his health, the insurers will be estopped to set up such untrue statement as a defence.³ [If the applicant makes a true answer, but the medical examiner writes a false one, unknown to the applicant, the company is responsible for the falsehood.⁴ (a) An applicant for insurance is not bound

¹ *Valton v. National Loan Fund Life Ass. Soc.*, 1 Keyes (N. Y.), 21, reversing s. c. 17 Abb. Pr. Rep. (N. Y.) 268.

² *Mutual, &c. Ins. Co. v. Wise*, 34 Md. 582.

³ *Connecticut Life Ins. Co. v. McMurdy* (Pa.), 8 Ins. L. J. 509; *Hurd v. Masonic, &c. Soc.* (Indianapolis Supr. Ct.), 6 Ins. L. J. 792; *Flynn v. Equitable Life Ass. Soc.*, 7 Hun (N. Y.), 387; s. c. 78 N. Y. 568. See also *ante*, §§ 123, 214.

⁴ [*Grattan v. Met. Life Ins. Co.*, 92 N. Y. 274.]

(a) This is true even when the application declares the examiner to be the applicant's agent: *Royal Neighbors of America v. Boman*, 177 Ill. 27; *Mass. Benefit Life Ass'n v. Robinson*, 104 Ga. 256; but see *Hubbard v. Mutual Re-*

serve Fund Life Ass'n, 80 Fed. Rep. 681; and when such examiner's report is accepted by the company, although he was not originally authorized to make the examination. *Knights of Pythias v. Cogbill*, 99 Tenn. 28; 41 S. W. 340.

by the conclusions of the examining doctor from his statements, or by the doctor's opinion in regard to them.¹ Although the medical examiner is the agent of the company, (a) if he is also the beneficiary, and the company knowing this issues the policy on his examination, he will not be compelled to show that the transaction was "in every respect, just, fair, upright and clear of all objection." The burden is on the company to show that his representations were false, to the knowledge of the examiner, or that he did not fairly and fully state the applicant's health.^{2]}

§ 304. **Family Physician; Medical Attendant.** — A "family physician" is the physician who usually attends and is consulted by the members of a family in the capacity of physician.³ And where the usual medical attendant is inquired for, the one who has been accustomed to attend, and not the one who has occasionally attended, should be mentioned;⁴ although the usual attendant be a quack.⁵ But where the usual medical attendant has not been called in for several years, and another is in attendance at the time the policy is applied for, it is for the jury to say, if, in answering the question, "Who is your medical attendant?" he gives the name of the usual attendant, and does not give the name of his attendant for the time being, the answer is true.⁶ So is it generally a question for the jury, whether the inquiry about medical attendant is truly answered.⁷ The object of

¹ [Lueder's Ex'r v. Hartford Life & Acc. Ins. Co., 4 McCrary, 149, 155.]

² [Fairchild v. North Eastern Mut. Life Ass., 51 Vt. 613.]

³ Price v. Phoenix Mut. Life Ins. Co., 17 Minn. 497; Reid v. Piedmont, &c. Ins. Co., 58 Mo. 421.

⁴ Huckman v. Fernie, 3 Mees. & Wels. 505; Monk v. Union Life Ins. Co., 6 Robt. (N. Y. Superior Ct.) 455.

⁵ Everett v. Desborough, 5 Bing. 503.

⁶ Maynard v. Rhode, 1 C. & B. 360.

⁷ Scoles v. Universal Life Ins. Co., 42 Cal. 523; Cushman v. United States, &c. Ins. Co., 70 N. Y. 72; Edington v. Mut. &c. Ins. Co., 5 Hun (N. Y.) 1; Seanlon v. Sceales, 13 Irish (Law), 71.

(a) A by-law authorizing the executive officers or trustees of a life company to appoint employees and fix their compensation is invalid in so far as they

attempt to appoint a medical examiner for life thereunder. Carney v. New York L. Ins. Co., 162 N. Y. 453; Beers v. New York L. Ins. Co., 66 Hun, 75.

reference to the medical attendant is to obtain the best information as to the quality of the life proposed, and it would seem that whatever be the form of the inquiry, the answer should be such as the applicant has reason to believe will best accomplish that object. Thus, in *Hutton v. Waterloo Life Assurance Society*,¹ where special inquiry was made as to sobriety and temperance, and also for the name and address of the medical attendant of the insured, and the answer affirmed habits of sobriety and temperance, and gave the name of a casual medical attendant, but did not give the name of a physician who had then recently attended him, while under *delirium tremens*, it was held to have been the duty of the applicant to have disclosed the name of the physician who attended him for *delirium tremens*, although the jury found the answer was not fraudulent. In *Forbes v. Edinburgh Life Assurance Company*,² the insured was asked to refer to a "medical man" (if possible, his usual medical attendant) to ascertain the present and general health of the party to be assured, and gave the name of a physician who could give little information on this point, but omitted to mention the name of one who might have been useful in that particular; and though the case was decided upon another point, the Lord President expressed himself very strongly against this as a fraud which would vitiate the policy. And when one is shown to have been the usual medical attendant, the relation will be presumed to be continued, unless a change be shown, within reasonable limits; so that an answer by an applicant that he has no usual medical attendant, when in fact he has had one who was in attendance within a month prior to making the application, — there being no evidence of discharge, — is false, and avoids the policy.³ But a former attending physician, who has retired from practice, and has recently attended in a single instance, gratuitously and as a friend in an emergency, pending the arrival of another physician who had been sent for,

¹ 1 F. & F. 735. See also *Abbott v. Howard, Hayes (Irish)*, 381.

² 10 Ct. of Sess. Cas. (Scotch) 451.

³ *Monk v. Union Mut. Life Ins. Co.*, 6 Robt. (N. Y. Superior Ct.) 455.

is not, as matter of law, an attending physician. At most, it would be a question for the jury.¹ An answer to the

¹ *Gibson v. American Mut. Life Ins. Co.*, 37 N. Y. 580. In the case in Minnesota, cited at the beginning of this section, as to the meaning of the phrase "family physician," arriving at the conclusion above given, and for the following reasons, Berry, J., speaking for the majority of the court, said: "The phrase, 'family physician,' is in common use, and has not, so far as we are aware, any technical signification. As used in this instance, and for the purposes of the testimony appearing in this case, the Chief Justice and myself are of opinion that it may be sufficiently defined as signifying the physician who usually attends, and is consulted by the members of a family, in the capacity of a physician. We employ the word 'usually,' both because we do not deem it necessary to constitute a person a family physician, as the phrase is used in this instance, that he should invariably attend and be consulted by the members of a family in the capacity of physician, and because we do not deem it necessary that he should attend and be consulted as such physician by each and all of the members of a family. For instance, the testimony in this case shows that at the time when the application for insurance was made, the family of Richard Price consisted of himself, his wife, and two or three children. We think that a person who usually attended, and was consulted by the wife and children of Richard Price as a physician, would be the family physician of Richard Price in the meaning of the above twenty-fifth interrogatory, although he did not usually attend on, and was not usually consulted as a physician by, Richard Price himself." The dissenting opinion by McMillan, J., was as follows: "One ground of defence set up is, that at the time the application was made and the policy executed, Richard Price, the deceased, had a family physician. No other issue is taken upon this interrogatory. It does not appear that the term 'family physician' has any technical signification; it is, therefore, for the court to determine the meaning of the phrase, 'family physician of the party.' As here used, the purpose of the interrogatory was to obtain the name and residence of the medical attendant best able to give an account of the physical condition, at the times referred to, of the person whose life was assured. *Bliss on Life Ins.* 171. This intention would be best effected by obtaining a reference to the physician who was the medical adviser of such person. The interrogatory, it seems to me, was made to embrace the two questions contained in it, and put in the alternative, in order that a true affirmative answer to either would elicit the address of the physician who had charge of the assured as his medical adviser. In both questions the inquiry is for the physician of the party: yet if the phrase, 'family physician of the party,' does not necessarily include the person assured, a true answer in many cases may be given to the first question embraced in the interrogatory, without disclosing the name of the physician of the assured; for instance, the person whose life is assured may have one person as his individual physician, and a different person as the physician of all the rest of his family; yet if the construction given by my brethren to the phrase, 'family physician of the party,' be correct, it seems to me he might, in answer to the inquiry for his family physician, truthfully give the name of the physician attending the other members of his family, and without the name of his personal physician; for, according to this construction, the terms of the question call for nothing more. It may be that such answer would be a true answer to the entire interrogatory, but that is not the question before us; the only point for us to determine is, whether Price's answer is false in this, that he had a family physician at the time, and answered that he had none. I am

question, "Have you employed any physicians? If so, give name or names," giving the name of one, while others had been employed, has been held to be "full, true, and correct," so far as it went, according to what might be fairly expected from the indefiniteness of the question in point of time.¹ [A warranty that the insured had not in a time named "consulted, or been prescribed for by a physician," is falsified by proof of such prescription, though it were only for a cold.²]

§ 305. **Age; Residence; Relationship.** — A substantial misrepresentation or equivocation as to the age is material, — although a fact not entering into the risk, — in that the age is important in determining the premium, that being at a greater or less rate as the age is more or less advanced.³ "It is trifling," said Pollock, C. B., in the case last cited, "to say that that is a true answer which requires something to be added to make it true." Where there was a mistake of one year in the statement of the age, the court instructed the jury that they might find from certain circumstances that the insurers were estopped to deny the truth of the statement, and if they did so find, the verdict should be for the amount which the premium paid would insure at the actual age.^{4(a)} [An insurance company, however, is charge-

unable, therefore, to concur with my brethren in the construction they give to the phrase, 'family physician of the party.' I think the phrase, as used in this instance, means the physician who usually attends and is consulted by all or most of the members of the family of the person whose life is assured, and that the person thus assured, if he has medical attendance, must be one of the members attended by such physician."

¹ Dilleber v. Knickerbocker Life Ins. Co., 76 N. Y. 567.

² [Metropolitan Life Ins. Co. v. McTague, 49 N. J. 587.]

³ Cazenove v. Brit. Eq. Ass. Co., 6 C. B. N. s. 437; Murphy v. Harris, Batty (Irish), 206; Wray v. Manchester Provident Ass. Co., *Nisi Prius*, cited from the London Times of March, 1871, by Bliss, Ins. 165; Murphy v. Harris, Batty (K. B.), 206; France v. Aetna, &c. Ins. Co., C. Ct. (Pa.), 2 Ins. L. J. 657; Ortlieb v. Northwestern Ins. Co., C. C. P. Ham. Co. (Ohio), 4 Ins. L. J. 311; Westropp v. Bruce, Batty (K. B.), 155; Continental Ins. Co. v. Goodall (Superior Ct., Cincinnati), 3 Am. Law Rec. 338; s. c. 5 Big. Life & Acc. Ins. Cas. 422. [A statement by the applicant for admission to a company which did not receive persons over sixty years old, that he was fifty-nine when he was really sixty-four, invalidates the contract. Swett v. Citizens' Mut. Relief Soc., 78 Me. 541.]

⁴ Epes v. Arlington Ins. Co. (Va.), 8 Ins. L. J. 342.

(a) The jury are to be instructed the risk as matter of law. Dolan v. that an understatement of age increases Mutual Reserve Fund Life Ass'n, 173

able with knowledge of all the facts stated by the applicant to the agent as to the time of his birth, and he having truly stated them the agent's misstatement will not avoid the policy.¹ A German applicant understanding English very imperfectly, when asked his age, said he could not tell; the agent made an estimate of his own and inserted it in the application, which the German signed without knowledge of the statement; the company was held estopped to set up the error as to age.² And it has been held that where the applicant truly answered the question as to residence, but failed to disclose the fact that she was in prison at the place of residence, it might be material; and it was for the jury to say whether it was or not, and this although there was nothing in the policy which could be construed as requiring the imprisonment to be stated.³ And in the Superior Court at Buffalo it was held, where the statements were warranties, that a representation that the person for whose benefit the policy was taken out was the wife of the applicant, when in fact she was not, was untrue and worked a forfeiture.⁴

§ 306. **Occupation.** — An untrue statement in the application, which is made a part of the policy, as to the occupation at the time the application is made, will avoid the

¹ [McCall v. Phoenix Ins. Co., 9 W. Va. 237, 243.]

² [Miller v. Phoenix Mut. Life Ins. Co., 107 N. Y. 292.]

³ Huguenin v. Rayley, 6 Taunt. 186.

⁴ Stannard v. Am. Pop. Life Ins. Co., cited in Bliss, Ins. 164. And so it was held in Holabird v. Atlantic Mut. Life Ins. Co., 2 Dillon, U. S. C. Ct. 166.

Mass. 197. See Mutual L. Ins. Co. v. Blodgett, 8 Tex. Civ. App. 45. The question of age is so material that substantial falsity in a statement in regard to it is fatal, whether the statement be regarded as a representation or a warranty. McCarthy v. Catholic Knights, 102 Tenn. 345, 351; Preuster v. Supreme Council, 135 N. Y. 417; Albert v. Mutual L. Ins. Co., 122 N. C. 92; Vivar v. Knights of Pythias (N. J.) 20 Ins. L. J. 373; Wolf v. District Grand Lodge, 102 Mich. 23.

A misrepresentation as to sex may also be material to the risk and fatal to a recovery on the policy, as where the owner was represented to be a successful business man, when in fact the owner was a woman who gave no attention to the risk. Freedman v. Phila. F. Ass'n, 168 Penn. St. 249. See Mechanics' & Traders' Ins. Co. v. Floyd (Ky.), 28 Ins. L. J. 335.

That an age limit may be waived by the insurer, see Wiberg v. Minnesota S. R. Ass'n, 73 Minn. 297.

policy. (a) What is necessary to be stated is the occupation in which the insured is engaged at the time, and not the occupation in which he may have been generally engaged before that time.¹ If one who is in fact a farmer, and has followed that business from his youth up, is occupied in any other pursuits, as a business, at the time he seeks insurance, the special occupation should be stated, and not the general one. The existing status of the applicant, in this particular, is that about which the insurers are interested to know,

¹ [See § 188 A.]

(a) See *Wright v. Vermont Life Ins. Co.*, 164 Mass. 302; *Aldrich v. Mercantile Mut. Acc. Ass'n*, 149 Mass. 457; *Kenyon v. Knights Templar Ass'n*, 122 N. Y. 247; *Guiltnan v. Met'n L. Ins. Co.*, 69 Vt. 469; *Dailey v. Preferred Masonic Mut. Acc. Ass'n*, 102 Mich. 239; *Pacific Mut. L. Ins. Co. v. Snowden*, 58 Fed. Rep. 342; *Triple Link Mut. Ind. Ass'n v. Williams (Ala.)*, 26 So. 19; *Fidelity Mut. L. Ins. Co. v. Ficklin*, 74 Md. 172; *Perrin v. Prudential Ins. Co.*, 61 N. Y. S. 249; *Malicki v. Chicago Guaranty Fund L. Society (Mich.)*, 77 N. W. 690; *Standard Life & Ac. Ins. Co. v. Ward*, 65 Ark. 295; *Knights of Maccabees v. Volkert (Ind. App.)*, 57 N. E. 203. The fact that the insured is killed or injured while engaged temporarily in an act or occupation classed as more hazardous than the one in which he was accepted, does not limit his recovery to the amount provided for such more hazardous risk or occupation, when there has been no fraudulent intent to mislead. The merchant who at one time measures a few bushels of grain, at another time hangs a few rolls of wall-paper upon his own premises, at another drives horses in a carriage or wagon, or at another rows a boat for exercise or recreation, does not change his occupation so as to change his class under the insurer's classification of risks, or become at these several times, a grain measurer, a paper

hanger, a teamster, or a boatman; but the word "occupation" refers only to the vocation, profession, trade, or calling in which the assured is engaged for trade or profit, and does not preclude him from performing such individual acts and such duties as are mere incidents in the daily life of men in any occupation, or from engaging in acts of exercise or diversion. *Berliner v. Travelers' Ins. Co.*, 121 Cal. 458; *Union Mut. Acc. Ass'n v. Frohard*, 134 Ill. 228; *Stone v. U. S. Casualty Co.*, 34 N. J. L. 371; *Hess v. Preferred Masonic M. Acc. Ass'n*, 112 Mich. 196; *Johnson v. London Guaranty & Ac. Co.*, 115 id. 86; *Perrin v. Prudential Ins. Co.*, 62 N. Y. S. 720. So a particular hazardous exposure, not a part of the insured's occupation, does not necessarily affect the policy. *Ibid.*; *Eaton v. Atlas Acc. Ins. Co.*, 89 Maine, 570; *Kentucky Life & Ac. Ins. Co. v. Franklin (102 Ky.)*, 43 S. W. 709; *Berliner v. Travelers' Ins. Co.*, 121 Cal. 451, 458; *Murphy v. American Mut. Ac. Ass'n*, 90 Wis. 206; *Fox v. Masons' Fraternal Acc. Ass'n*, 96 Wis. 390; *Holiday v. American Mut. Acc. Ass'n*, 103 Iowa, 178. The contract made by the policy is not affected, as to the insured's occupation, by subsequent by-laws made by the insurer on that subject. *Hobbs v. Iowa Mut. Ben. Ass'n*, 82 Iowa, 107.

and substantial untruth relative thereto is fatal.¹ In England, it has been held that a representation that the applicant was an "esquire" is sufficient, if true, although he was then engaged in business as an iron-monger. Such a statement, said Hill, J., "is not untrue, but simply imperfect. Suppose the applicant had been a wine-merchant and a banker, and had put down only that he was a banker, could it have been said that that was an untrue statement? I think not." The majority of the judges in the Queen's Bench thought the word designated an occupation, and, being true as far as it went, was sufficient; though Cockburn, C. J., thought the answer tantamount to saying that he had no occupation, and was untrue.² But the judgment was affirmed in the Exchequer Chamber.³ "It is said," said Williams, J., "the statement of the plaintiff that he was an esquire was an untrue statement, because it was a suppression of the truth; the truth being that he was also an iron-monger. But there is no foundation for the argument. The plaintiff said, in effect, I am in that position in life in which people are usually addressed as esquires. A man who is in such a position is no more deserving of the imputation of telling an untruth by calling himself an esquire, without adding his trade, than a peer of the realm would be who should describe himself as such, and not also state that he was a brewer, banker, or ironmaster, as the case might be." But the position of the defendant's counsel, that, "in withholding the fact that he was an ironmonger he was guilty of a *suppressio veri* tantamount to a positive statement that he had no occupation," does not seem to be satisfactorily answered. The language of Williams, J., shows that esquire was a mere title of courtesy indicative of social position, and if this case is law, then a man who is actually engaged in the business of manufacturing nitro-glycerine or gunpowder, if he happen to be a peer, need only state the latter fact. Yet a peer would know, presumably, that the fact that he

¹ Hartman v. Keystone Ins. Co., 31 Pa. St. 466.

² Perrins v. Mar. & Gen. Tr. Ins. Co., 2 E. & E. 317.

³ 2 E. & E. 324.

was a peer was of little or no moment to the insurers, while the fact that he was engaged in a hazardous business was of the greatest moment. It would seem that if a man have two or more occupations, if he be not required to state all, he ought at least to state that one which he has reason to believe the insurers are most interested to know, and whether he had done this in the particular case would be for the jury to say. Perhaps, as was said by Black, J., in the case from Pennsylvania, above cited, where the warranty was that the statement was in *all respects* true, such warranty ought not to be held to include "inaccuracies which are not material." But substantial truth certainly is required both by the conditions of the contract and by the good faith which ought to inspire the answers to such questions.¹ And there is no such substantial difference between a "soda-water maker" and a vender of soda-water as to work a forfeiture.² If the statement of present occupation be true, however, any subsequent change will not avoid the policy, if not so stipulated.³

¹ And see *Smith v. Aetna Life Ins. Co.*, 49 N. Y. 211.

² *Grattan v. Metropolitan Ins. Co.*, 80 N. Y. 281.

³ *Provident Life Ins. of Chicago v. Fennell*, 49 Ill. 180.

CHAPTER XV.

SUICIDE.

ANALYSIS.

§ 307.

"Taking one's own life," or "death by one's own hands," is usually excepted in life policies.

a policy obtained with intent to commit suicide would be void without any proviso, § 307, n.

but one *bona fide* taken, with no provision covering self-destruction, or contemplation of it, should be sustained in the absence of a clause of exception; the point however is doubtful on authority; see below, §§ 323-324. when there is an exception, *voluntary death* by one in possession of his faculties is within it by all authorities, § 307.

while *accidental, unintended death* is not, though by one's own act; (see also § 321).

although the policy expressly excludes death by taking poison, such taking by *mistake* is not fatal to the policy, though it may be to the man, § 307.

but in regard to *suicide by an insane person*, opinions differ, § 307 *et seq.*

§ 308.

"Death by his own hand" held to mean the same as suicide, *felo de se*, criminal self-destruction (see also § 316). Every man in providing for his family must contemplate that insanity is one of the diseases by which he may die. Three opinions (or two at least) as to when the exception applies.

(1) *Insured must be morally responsible and not under irresistible impulse.*

In order to avoid the policy the insured must be able to appreciate the nature and quality of his action, and must act voluntarily in the sense of being morally responsible, and not under the control of an irresistible impulse, §§ 307, n., 308, 316. The person whose life is insured gets no money, and the love of life is strong enough generally to guard against death for the benefit of others. One who dies by his own insane act dies by disease, and the form it takes does not alter the fact, § 311. Even clear intelligence has been held not to bring the case within the exception, where the will was subordinated to uncontrollable emotion, § 312.

- § 309. (2) *Clear understanding of physical nature of the act enough.* Some cases hold that the exception applies if the assured knew what he was doing and that the consequence of his act would be death, but that if unconscious of what he was doing, and acting under an insane delusion overpowering his will, it does not apply, §§ 307, 309 ; see also §§ 317, 318.

This is the best view ; see next paragraph.

- § 310. (3) *Evidence of insanity excluded.* Some cases go as far as that in their assertions, saying that the act of self-destruction brings the case within the letter of the agreement, and that the court could not qualify the contract made by the parties, § 310. The case, however, as qualified in the opinion, seems identical in principle with the second group. The court say that moral responsibility does not affect the question. It was against *intentional* self-destruction that the company provided, to secure itself against any motive of the insured to provide for his dear ones by taking himself off ; and such a motive may act on a diseased mind as well as on one that is sound ; (see also § 316, 2).

This seems the sense and spirit of the matter. The letter covers all self-killing ; but the *reason* of the exception must govern, and the policies should protect the beneficiaries so far as possible. They need it as much in case of suicide as in any other. On the other hand, to hold "death by his own hand" identical with criminal suicide, and to require moral responsibility and freedom from irresistible impulse, is clearly making a new contract very different from the plain sense and spirit of the words. It is a question if any impulse that causes action is resistible. The prospect of providing for wife and family may in some states of mind be an irresistible motive, yet it is the very one the company wishes to exclude.

One thing is clear, there must be an intent to take his life, § 321.

accident, overpowering force, or a fit of delirium or frenzy are not within the stipulation, §§ 310, 5, 320 ; but if the will acts though the person is not responsible, the policy is void, §§ 313-315.

- § 322. The insurers may eliminate the question of insanity by express words, but they will have to be very careful to make those words strong and clear. "Die by his own hand under any circumstances" is not enough, nor "sane or otherwise," nor "voluntary or involuntary ;" but "felonious or otherwise" has been held sufficient, and "sane or insane" is certainly so, — at least the courts have not yet found a way to overcome it.

a by-law subsequent to the policy will not do.

sometimes there is a provision to pay back the premiums and interest in case of suicide.

- § 323. Suicide in a fit of insanity does not affect the policy unless there is an express provision, § 323.

and there is some authority that no suicide will affect heirs and beneficiaries unless so provided, § 324; a policy issued for the benefit of a third person is not affected by suicide, although voluntary and sane.

An express insurance against voluntary suicide is void as against public policy.

§ 324. except as in favor of one *bona fide* interested in the policy for value.

§ 307. **Suicide; Death by One's own Hands; Taking One's own Life.** — Prominent among the causes which insurance companies have provided¹ shall exempt them from liability under life policies is death by suicide; or, as it is sometimes expressed, if the insured "shall die by his own hands," or "take his own life." It is prominent also in the difficulty which has been found in determining the meaning of the provision, and the learning and ability which has been displayed in the attempt. The courts seem to delight in its discussion. There seems to be about this question a fascination which the judicial mind is unable to resist; and whenever the question presents itself, whether in the courts of Westminster Hall, or those of our western wilderness, it has given rise to so many and such interesting opinions as to have secured for the student, if not relief from his perplexing doubts, at all events recreation and instruction while he is devoting himself diligently to inquiries which he hopes may result in such relief.

Upon the question of voluntary suicide intentionally committed by a sane man in the possession of his faculties, knowing how to adapt means to ends, and conscious of the immorality of the act, there is not, as indeed there could not well be, any difference of opinion, and all authorities agree that such a suicide is within the exemption. And all the authorities likewise agree that an accidental death, as by taking poison² by mistake, or shooting one's self with a

¹ [A policy obtained with intent to commit suicide is void for fraud in its inception, without any clause concerning self-destruction. *Smith v. National Ben. Soc.*, 51 Hun, 575.]

² [Even a policy which expressly excludes death "by taking poison" does not cover a case of taking poison by *mistake*, and the beneficiary in such a case cannot recover. *Pollock v. United States Mut. Acc. Ass.*, 102 Pa. St. 230.]

pistol, supposing it not to be loaded, or falling from a building, or death happening in any way by the unintended act of the party dying, is not within the exemption.¹ But whether suicide by an insane man is also within the exemption has been the question in dispute, and upon this two prominent and different doctrines have been maintained. On the one hand, it is maintained that if the act be voluntarily done in pursuance of an intelligent purpose, and intentionally and intelligently carried out by the proper adaptation of means to ends, it is suicide on the part of the insured, or death by his own hands, although insanity exist to such an extent that he may not be able to appreciate the moral qualities of the act.² On the other hand, it is maintained with equal vigor, that, however intelligently the act may be done, if at the time the will be overpowered by an uncontrollable impulse, or the party be unable to appreciate the moral character of the act, it is not within the meaning of the provision.³ [Where the insured fell, and

¹ [A death by accidental or unintentional self-killing, is not suicide voluntary or involuntary. *Keels v. Mutual Reserve Fund Ass.*, 29 Fed. Rep. 193 (S. C.), 1886. And a condition for avoidance in case the assured shall die by his own hand, sane or insane, does not cover a case of death by act of the insured not intended to cause death, as by an overdraft of whiskey taken as medicine in a weak state of health. *Northwestern Mut. Life Ins. Co. v. Hazelett*, 105 Ind. 212.]

² [The company must show that the insured knew the physical nature of his act, and that it would result in self-destruction; but is not bound to show that he was legally or morally responsible. *Mutual Ben. Life Ins. Co. v. Daviess' Ex'x*, 87 Ky. 541. It makes no difference that he was incapable of knowing the moral nature of his act. *Nimick v. Mutual Ins. Co.*, 10 Am. L. Reg. N. S. 101; 3d Cir. (Pa.) 1881; *Gay v. Union Mut. Life Ins. Co.*, 9 Blatch. 142.]

³ [If the reason of the insured is so far impaired that he does not understand the general nature, consequences, and moral character of his act, or if he is impelled to it by an insane impulse that he has not the power to resist, the death is not within the contemplation of the parties to the exception, and the company is liable. *Life Ins. Co. v. Terry*, 15 Wall. 580; *Waters v. Conn. Mut. Life Ins. Co.*, 2 Fed. Rep. 892; 9 Ins. L. J. 337. It is difficult to see what this leaves of the exception, for every suicide is due to "an insane impulse which the victim has not the power to resist." *Suppiger v. Covenant Mut. Ben. Ass.*, 20 Brad. 595. Suicide and self-destruction are synonymous, and in law imply capacity to form a legal intention and deliberate action. Wherefore if the insured was not able to understand the moral nature of his act, or was impelled by an impulse too strong for him to resist, it is not self-destruction, although he knew and intended that the result of his act should be fatal. *New Home Life Ass. v. Hagler*, 29 Ill. App.

about six weeks after became insane, and took his life, it was held that the question whether the fall was the *cause* of the killing was too conjectural to be submitted to the jury as a *direct* cause of self-destruction.¹ Stating the disease of which the insured died is a satisfactory mode of excluding the hypothesis of self-destruction, &c.²

§§ 308, 309. "**Death by his own Hand.**" — And hereupon there has been hitherto, and still is an irreconcilable conflict of opinion, both among different courts and among the different judges of the same court. And while at one time it seemed that the former opinion was likely to become the prevailing one, both from the character and from the number of the courts and judges who adopted it, at this moment it must be admitted that there is little reason upon such grounds to look for such a result; and the question, in this country at least, must still be considered an open one, with the preponderance, perhaps, in favor of the latter view. We have therefore no alternative but to give its history, and by so doing we shall best show the present state of the question. The question first arose in New York, in a case³ of self-destruction by drowning, where the defence was suicide, to which there was a reply that the insured was insane at the time, and this reply was demurred to. The insurers were

437. A self-killing by an insane person, understanding the physical nature and consequences of his act, but not its moral aspect, is not a death by suicide. *J. Gray, in Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121. A policy against "bodily injuries effected through external, accidental, and violent means," except those "caused wholly or in part by bodily infirmities or disease, or by suicide or self-inflicted injuries," covers a death by hanging one's self while insane. The act of an insane person is no more his act in the sense of the law than if he had been impelled by irresistible physical power. By the decisions of this court, whether the unsoundness of mind is such as to destroy understanding of the physical nature and consequences of the act, or only to obliterate the perception of its moral nature, self-killing by an insane person is not suicide, or death by his own hand. Insanity, moreover, is not a "bodily" disease, but a mental disease, and so not within the excepting clause. *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 531-534.]

¹ [*Streeter v. Insurance Co.*, 65 Mich. 199.]

² [*Covenant Mut. Ben. Ass. v. Hoffman*, 110 Ill. 608.]

³ *Breasted v. Farmers' Loan & Trust Co.*, 4 Hill (N. Y.), 73. The English cases are all cited, and their results sufficiently stated in the American cases referred to.

not to be liable if the assured should die by his own hand. The plaintiffs had judgment upon the demurrer, and this judgment was afterwards affirmed by the Court of Appeals.¹

¹ Nelson, C. J., here said: "The question arising upon the demurrer is, whether Comfort's self-destruction in a fit of insanity can be deemed a death *by his own hand*, within the meaning of the policy. I am of opinion that it cannot. . . . The connection in which the words stand in the policy would seem to indicate that they were intended to express a criminal act of self-destruction, as they are found in conjunction with the provision relating to the termination of the life of the insured in a duel, or by his execution as a criminal. This association may well characterize and aid in determining the somewhat indefinite and equivocal import of the phrase. Speaking legally, also (and the policy should be subjected to this test), self-destruction by a fellow-being, bereft of reason, can with no more propriety be ascribed to the act of his *own hand*, than the deadly instrument that may have been used for the purpose. The drowning of Comfort was no more *his act*, in the sense of the law, than if he had been impelled by irresistible physical power; nor is there any greater reason for exempting the company from the risk assumed in the policy, than if his death had been occasioned by such means. Construing these words, therefore, according to their true, and, as I apprehend, universally received meaning among insurance offices, there can be no doubt that the termination of Comfort's life was not within the saving clause of the policy. Suicide involves the deliberate termination of one's existence while in the possession and enjoyment of his mental faculties. Self-slaughter by an insane man or a lunatic is not an act of suicide within the meaning of the law." 4 Bl. Comm. 189; 1 Hale's P. C. 411, 412.

Ten years later this judgment was affirmed in the New York Court of Appeals. 8 N. Y. 299. (Five judges for affirmation, three for reversal.) The case was sent to a referee, and on appeal from his finding Willard, J., for the majority, said: "It is material to determine, in the first place, what is meant by the term, *death by his own hand*, which is to avoid the policy. If the words are construed according to the *letter*, an accidental death caused by the instrumentality of the *hand* of the insured would fall within the exception. Thus, should the insured, by mistake, swallow poison, and thereby terminate his life, his representatives could not recover on the policy if the poison was conveyed to his mouth *by his own hand*. The same rule of construction applied to the words, *death by the hands of justice*, in the same connection, would take the case out of the exception, if the death was occasioned by strangulation by a *rope* instead of the *hands* of the minister of justice. But it is too plain for argument that the *literal* meaning is not the true meaning of either phrase. . . . In popular language, the term *death by his own hand* means the same as *suicide*, or *felo de se*. The first two, indeed, are not technical terms, and *may* be used in a sense excluding the idea of criminality. The connection in which they are used in this policy indicates that the phrase *death by his own hand* meant an act of criminal self-destruction. Provisos declaring the policy to be void in case the assured *commit suicide* or *die by his own hand*, are used indiscriminately as expressing the same idea. In the note to *Borradaile v. Hunter*, 5 Man. & Gr. 639, 648, are given the forms of the proviso used by seventeen of the principal London insurance companies. In eight of them the exception is of a death *by suicide*, and in nine of a *death by the assured's own hands*. In two, separate provision is made in case of a death by suicide not *felo de se*, and in two others in

§ 310. Life Insurance; Suicide.—The question next came

case of a death *by his own hands*, not *felo de se*. It is obvious, therefore, that the phrase, death by *his own hand* and death by *suicide* mean the same thing, and that both, unless qualified by some other expressions, import a criminal act of self-destruction. The connection in which they stand in this policy favors this construction. The first four exceptions in the policy are of acts innocent in themselves, three of which become inoperative if the defendants give their consent and have it indorsed on the policy. Then follow the last four exceptions; viz., *if he shall die by his own hand, or in consequence of a duel, or by the hands of justice, or in the known violation of any law, &c.* By the acknowledged rule of construction, *noscitur a sociis*, the first member of the sentence, if there be any doubt as to its meaning, should be controlled by the other members, which are entirely unequivocal, and should be construed to mean a felonious killing of himself. Broom's Maxims, 293, 450. It is a note laid down by Lord Bacon that *copulatio verborum indicat acceptationem in eodem sensu*; the coupling of words together shows that they are to be understood in the same sense. And when the meaning of any particular word is doubtful or obscure, or when the expression, taken singly, is inoperative, the intention of the parties using it may frequently be ascertained and carried into effect by looking at the adjoining words, or at expressions occurring in other parts of the same instrument, for *quæ non valeant singula juncta juvant*. Bacon's Works, vol. iv. p. 26; 2 Buls. Broom's Maxims, 293. Besides, the words in this case are those of the insurer, and, if susceptible of two meanings, should be taken most strongly against him. It was not contended on the part of the defendant that the policy would be avoided by a mere *accidental* destruction of life by the party himself. It was urged that it would be, if the act was *done intentionally*, although under circumstances which would exempt the party from all moral culpability. It was insisted that the expression must be taken to mean a death *by his own act*. It seems to me that this is a yielding of the whole question. An insane man, incapable of discerning between right and wrong, can form no intention. His acts are not the result of thought or reason, and no more the subject of punishment than those which are produced by *accident*. The acts of a madman, which are the offspring of the disease, subject him to no criminal responsibility. If the insured, while engaged in his trade as a house-joiner, had accidentally fallen through an opening in the chamber of a house he was constructing, and lost his life, the argument concedes that the insurer would have been liable. The reason is that the mind did not concur with the act. How can this differ in principle from a death in a fit of insanity, when the party had no mind to concur in or oppose the act? It must occur to every prudent man seeking to make provision for his family by an insurance on his life, that insanity is one of the diseases which may terminate his being. It is said the defendants did not insure the continuance of the intestate's reason. Nor did they in terms insure him against the small-pox or scarlet-fever; but had he died of either disease, no doubt the defendants would have been liable. They insured the continuance of his life. What difference can it make to them or to him, whether it is terminated by the ordinary course of a disease in his bed, or whether in a fit of delirium he ends it himself? In each case the death is occasioned by means within the meaning of the policy, if the exception contemplates, as I think it does, the destruction of life by the intestate while a rational agent, responsible for his acts. . . . It is urged that because a person *non compos mentis* is liable *civiliter* for torts committed while in a state of insanity, therefore insanity has no effect

before the Supreme Court of Massachusetts, in 1862,¹ and

to qualify this exception in the policy. That conclusion is not a legitimate deduction from the premises. A rational man is liable *civiliter* for an injury occasioned by an accident, unless it be an inevitable one, and yet no one pretends that the insurer is not liable for a death by accident, whether inevitable or not. Indeed, the liability for death by accident was conceded on the argument. A death by accident, and a death by the party's own hand, when deprived of reason, stand on principle in the same category. In both cases the act is done without a controlling mind. If the insurer is liable in the one case, he should be in the other. If the insured was compelled by duress to take his own life, it will hardly be contended that the insurers could avoid payment. In what consists the difference between the duress of men and duress of Heaven? Can a man be said to do an act prejudicial to the insured when he is compelled to do it by irresistible coercion? and can it make any difference whether this coercion come from the hand of man or the visitation of Providence?

"But it is urged that this is a civil action, and the contract of insurance a civil contract. Be it so. A person so destitute of reason as not to know the consequences of his acts can make no valid contract. Whether the incompetency be the result of disease or of intoxication, his contracts made while in that condition are void. *Barrett v. Buxton*, 2 Aikens (Vt.), 167, approved by Chancellor Walworth in *Prentice v. Achorn*, 2 Paige, 31, and by Chancellor Kent, in 2 Comm. 451; *Smith's Law of Contracts*, 329, 333, and notes. If the party could do no act to bind himself, he certainly could do none to bind the insurer. If he could not make a bond, he could not make a release. If he could not make a will, he could not revoke one. The liability of a lunatic for necessities rests upon the ground that the law will raise a contract by implication on the part of the lunatic, in favor of the party who has supplied them in good faith, and therefore does not affect the present question. *Wentworth v. Tubb*, 1 Younge & Coll. Ch. 171. The cases on this head are analogous to that of an infant. See *Smith's Law of Contracts*, 325 *et seq.*, and notes, where the cases are collected and reviewed. The law, to prevent a failure of justice, will *imply a promise* by a party incapable of making a contract; but it will never imply that a party incapable of distinguishing between right and wrong was guilty of a fraud. At the time this case was decided by the Supreme Court on the demurrer there had been no case, either in this country or in England, in which the same question had arisen. The case of *Borradaile v. Hunter*, 5 Man. & Gr. 639, decided by the English Common Pleas in 1843, has since been reported. That action was brought by the executor of the insured upon a life policy containing a proviso that in case the assured should die by his own hands, or by the hands of justice, or in consequence of a duel, the policy should be void. The assured threw himself into the Thames and was drowned. Upon an issue, whether the assured died by his own hands, the jury found that he *voluntarily* threw himself into the water, *knowing* at the time that he should thereby destroy his life, and intending thereby to do so; but at the time of committing the act he was not capable of judging between right and wrong. It was held by a majority of the court, Tindal, C. J., dissenting, that the policy was avoided, as the proviso included all acts of *voluntary* self-destruction, and was not limited by the accompanying proviso to acts of felonious sui-

¹ *Dean v. American Life Ins. Co.*, 4 Allen (Mass.), 96. The opinion was by Bigelow, C. J.:—(1) "There can be no doubt that the facts agreed by the parties concerning the mode in which the assured destroyed his own life

was very elaborately considered. The insured had cut his

cide. The three judges who formed the majority laid the main stress upon the fact that the jury found the act of self-destruction to be *voluntary*, that he knew when he threw himself into the river he should thereby destroy his life, and that he intended thereby to do so. The referees in the present case have not found that the intestate acted *voluntarily*, or that he knew the consequence of his act. They merely find that while insane, for the purpose of drowning himself, he threw himself into the river, not being mentally capable of distinguishing between right and wrong. If *Borradaile v. Hunter* be an authority which we ought to follow, it differs so much from the case before us, that we are at liberty to decide it upon principle.

"After the case of *Borradaile v. Hunter*, the case of *Schwabe v. Clift* was tried at *Nisi Prius*, before Cresswell, J. It was upon a policy upon the life of the plaintiff's intestate, containing the proviso that if the assured should '*commit suicide*, or die by duelling or by the hands of justice,' the policy should be void. The assured died from the effects of sulphuric acid taken by himself, but evidence was given tending to show that at the time he took the sulphuric acid he was in part of unsound mind. In his charge to the jury, the learned judge said that, to bring the case within the exception, it must be made to appear that the deceased died by his own *voluntary* act; that at the time he committed the act he could distinguish between right and wrong, so as to be able to understand and appreciate the nature and quality of the act he was doing; and that, therefore, he was at that time a responsible being. The jury found for the plaintiff." 2 Car. & Kirwan, 134. This cause was afterwards brought into the Court of Exchequer Chamber on the bill of exceptions, and will be found in 3 Man. & Gr. 437, by the title of *Clift v. Schwabe*. That court, by a vote of four to two, ordered a new trial, holding that the direction was erroneous; for that the terms of the condition included all acts of *voluntary* self-destruction, and therefore, if A. voluntarily killed himself, it was immaterial whether he was or was not a responsible moral agent. The case is open to the same remark as *Borradaile v. Hunter*, *supra*. It turned upon the assumed fact that the act of suicide was *voluntary*, a fact not found by the referees in this case. In the above quoted case, Gardner, J., dissenting, said: "It is by the finding established that the assured cast himself into the river for the purpose of drowning himself. The act committed by him was therefore voluntary, and accompanied by so much intelligence as to enable the agent to contemplate a particular result, and adopt the means requisite to accomplish it. His object was self-destruction by drowning. For this purpose he cast himself into the river, and thereby effected it. If this was not 'dying by his own hand,' within the spirit and intent of this clause of the policy, it is difficult to attach any legal significance to such language. If, under the same circumstances, the assured had destroyed the property or assaulted the person of a citizen, he would have been civilly responsible for all the damages sustained by the latter. *Weaver v. Ward*, Hob. 134; *Cross v. Andrews*, Cro. Eliz. 622. Insanity, unless it suspended the power of volition, would be no justification; still less a want of moral perception to distinguish between right and wrong. I can perceive no reason why upon the same principle he should not be held responsible for a wilful breach of contract resulting from self-destruction, where it was premeditated, and accom-

bring this case within the strict letter of the proviso in the policy, by which it was stipulated that it should be void and of no effect if the assured should 'die by his own hand.' The single question, therefore, which we have to determine is, whether, on the well-settled principles applicable

throat with a razor, and the plaintiffs, in answer to the

plished by means usual and appropriate to effect his design. In *Bagster v. Earl of Portsmouth*, 7 Dowl. & Ryl. 614, it was held that a lunatic was capable of contracting for necessities. 'Imbecility of mind,' says Abbott, C. J., 'may, or may not, be a defence in the case of an unexecuted contract.' These cases show that the assured, although insane, is a responsible agent for some purposes, and consequently, *a fortiori*, that he can be affected and bound by a condition which qualifies the liability of the insurers, and which, in terms, is made to depend upon an act to be performed by the former. In *Borradaile v. Hunter*, 5 Man. & Gr. 639, in a life policy containing the same proviso found in the one before us, the jury found that the insured 'voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life, and intending thereby to do so, but at the time of committing the act he was not capable of judging between right and wrong.' It was held that the policy was avoided. The proviso included all acts of self-destruction, and was not limited by the accompanying provisos to acts of felonious suicide. This decision was pronounced in 1843, and the case is not distinguishable from the one under consideration. The case cited was argued and decided as one of insanity, in which, however, the assured was capable of voluntary action. Erskine, J., remarked, 'that all the contract required was, that the act of self-destruction should be the voluntary and wilful act of a man having at the time sufficient power of mind to understand the physical nature and consequence of the act, and having the intention to choose his own death.' In that case, and in the present, the incapability of distinguishing between right and wrong was the measure of the insanity of the assured. Four years afterwards, *Clift v. Schwabe* was decided in the Exchequer Chamber, 3 C. B. 437; 3 Man., Gr. & Scott, 437, upon a policy in which the word 'suicide' occurred in place of the phrase 'dying by his own hands.' The issue was upon the fact of suicide, and an exception to the charge of the judge: it was held that the terms of the condition included all acts of voluntary self-destruction, and if the insured voluntarily killed himself, it was immaterial whether he was or not a responsible moral agent. These cases are directly in point; that last mentioned is much stronger for the assured than the one now under consideration. When this case was before the Supreme Court on demurrer, the replication averred that when the assured drowned himself he was of *unsound mind and wholly unconscious of the act*. This was admitted by the demurrer, and the question whether voluntary action can exist without some degree of consciousness, is very different from the one presented by the finding before us." The phrase "wholly unconscious of the act" refers to the real nature and character of the act, as a crime, and not to the mere act itself. *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284.

to the construction of contracts, we can so interpret the language of the policy as to add to the proviso words of qualification and limitation, by which the natural import of the terms used by the parties to express their meaning will be so modified and restricted that the case will be taken out of the proviso, and the policy be held valid and binding on the defendants. In other words, the inquiry is whether the proviso can be so read that the policy was to be void in case the assured should die by his own hand, he being sane when the suicide was committed. If these or equivalent words cannot be added to the proviso, or if it cannot be held that they are necessarily implied, then it must follow that the language used is to have its legitimate and ordinary signification, by which it is clear that the policy is void. (2) In considering this question, we

objection that his death was by his own hands, offered to

are relieved of one difficulty which has embarrassed the discussion of the same subject in other cases. If the proviso had excepted from the policy death by 'suicide,' it would have been open to the plaintiffs to contend that this word was to have a strict technical definition, as meaning in a legal sense an act of criminal self-destruction, to which is necessarily attached the moral responsibility of taking one's life voluntarily, and in the full exercise of sound reason and discretion. But the language of the proviso is not necessarily limited by the mere force of its terms. The words used are of the most comprehensive character, and are sufficiently broad to include every act of self-destruction, however caused, without regard to the moral condition of the mind of the assured, or his legal responsibility for his acts. (3) Applying, then, the first and leading rule by which the construction of contracts is regulated and governed, we are to inquire what is a reasonable interpretation of this clause according to the intent of the parties. It certainly is very difficult to maintain the proposition that, where parties reduce their contract to writing, and put their stipulations into clear and unambiguous language, they intended to agree to anything different from that which is plainly expressed by the terms used. It is, however, to be assumed that every part of a contract is to be construed with reference to the subject-matter to which it relates, and with such limitations and qualifications of general words and phrases as properly arise and grow out of the nature of the agreement in which they are found. Giving full force and effect to this rule of interpretation, we are unable to see that there is anything unreasonable or inconsistent with the general purpose which the parties had in view in making and accepting the policy, in a clause which excepts from the risks assumed thereby the death of the assured by his own hand, irrespective of the condition of his mind, as affecting his moral and legal responsibility at the time the act of self-destruction was consummated. Every insurer, in assuming a risk, imposes certain restrictions and conditions upon his liability. Nothing is more common than the insertion, in policies of insurance, of exceptions by which certain kinds or classes of hazards are taken out of the general risk which the insurer is willing to incur. Especially is this true in regard to losses which may arise or grow out of an act of the party insured. Such exceptions are founded on the reasonable assumption that the hazard is increased when the insurance extends to the consequences which may flow from the acts of the person who is to receive a benefit to himself or confer one on others by the happening of a loss within the terms of the policy. Where a party procures a policy on his life, payable to his wife and children, he contemplates that, in the event of his death, the sum insured will inure directly to their benefit. So far as a desire to provide in that contingency for the welfare and comfort of those dependent on him can operate on his mind, he is open to the temptation of a motive to accelerate a claim for a loss under the policy by an act of self-destruction. Against an increase of the risk arising from such a cause, it is one of the objects of the proviso in question to protect the insurers. Although the assured can derive no pecuniary advantage to himself by hastening his own death, he may have a motive to take his own life, and thus to create a claim under the policy, in order to confer a benefit on those who, in the event of his death, will be entitled to receive the sum insured on his life. Unless, then, we can say that such a motive cannot operate on a mind diseased, we cannot restrict the words of the proviso so as to except from the risk covered by the policy only the case of criminal suicide, where the assured was in a condition to be held legally and morally responsible for his acts. It certainly would be contrary to experience to affirm that an insane person can-

show that the death was caused during a state of insanity. But this was held inadmissible.

not be influenced and governed in his actions by the ordinary motives which operate on the human mind. Doubtless there may be cases of delirium or raving madness where the body acts only from frenzy or blind impulse, as there are cases of idiocy or the decay of mental power, in which it acts only from the promptings of the lowest animal instincts. But in the great majority of cases where reason has lost its legitimate control, and the power of exercising a sound and healthy volition is lost, the mind still retains sufficient power to supply motives and exert a direct and essential control over the actions. In such cases, the effect of the disease often is to give undue prominence to surrounding circumstances and events, and, by exaggerating their immediate effects or future consequences, to furnish incitement to acts of violence and folly. A person may be insane, entirely incapable of distinguishing between right and wrong, and without any just sense of moral responsibility, and yet retain sufficient powers of mind and reason to act with premeditation, to understand and contemplate the nature and consequences of his own conduct, and to intend the results which his acts are calculated to produce. Insanity does not necessarily operate to deprive its subjects of their hopes and fears, or the other mental emotions which agitate and influence the minds of persons in the full possession of their faculties. (4) On the contrary, its effect often is to stimulate certain powers to extraordinary and unhealthy action, and thus to overwhelm and destroy the due influence and control of the reason and judgment. Take an illustration. A man may labor under the insane delusion that he is coming to want, and that those who look to him for support will be subjected to the ills of extreme poverty. The natural effect of this species of insanity is to create great mental depression, under the influence of which the sufferer, with a view to avoid the evils and distress which he imagines to be impending over himself and those who are dependent upon him for support, is impelled to destroy his own life. In such a case, suicide is the wilful and voluntary act of a person who understands its nature, and intends by it to accomplish the result of self-destruction. He may have acted from an insane impulse, which prevented him from appreciating the moral consequences of suicide; but, nevertheless, he may have fully comprehended the physical effect of the means which he used to take his own life, and the consequences which might ensue to others from the suicidal act. It is against risks of this nature — the destruction of life by the voluntary and intentional act of the party assured — that the exception in the proviso is intended to protect the insurers. The moral responsibility for the act does not affect the nature of the hazard. The object is to guard against loss arising from a particular mode of death. The *causa causans*, the motive or influence which guided or controlled the will of the party in committing the act, is immaterial, as affecting the risk which the insurers intended to except from the policy. This view is entirely consistent with the nature of the contract. It is the ordinary case of an exception of a risk which would otherwise fall within the general terms of the policy. These comprehended death by disease, either of the body or brain, from whatever cause arising. The proviso exempts the insurers from liability when life is destroyed by the act of the party insured, although it may be distinctly traced as the result of a diseased mind. It may well be that insurers would be willing to assume the risk of the results flowing from all diseases of the body, producing death by the operation of physical causes, and yet deem it expedient to avoid the hazards of mental disorder, in its effects on the will of the assured, whether it originated in bodily disease, or arose from external circum-

§ 311. Afterwards, in 1866, the question arose in the

stances, or was produced by a want of moral and religious principle. (5) It was urged very strongly by the learned counsel for the plaintiffs, that this view of the construction of the contract was open to the fatal objection that it would necessarily lead to the absurd conclusion that death occasioned by inevitable accident or overpowering force, or in a fit of delirium or frenzy, if the proximate and immediate cause was the hand of the person insured, would be excepted from the risks assumed by the defendants. But this objection is sufficiently answered by the obvious suggestion that such an interpretation, although within the literal terms of the proviso, would be contrary to a reasonable intent, as derived from the subject-matter of the contract. An argument having for its basis a *reductio ad absurdum* is not entitled to much weight when it is necessary to ascertain the intention of the parties to a contract, and to conform to that intention in giving an interpretation to the language used. Indeed, when it becomes necessary (as the case on the part of the plaintiff requires) to desert the literal import of terms adopted by parties to express their meaning, as it cannot be reasonably supposed that they intended to enter into stipulations which would be unreasonable or absurd, all conclusions which tend to establish such a result are necessarily excluded. The question in such cases is not how far can the literal meaning of words be extended, but what is a reasonable limitation and qualification of them, having regard to the nature of the contract and the objects intended to be accomplished by it. Applying this principle to the present proviso, and assuming that the plaintiffs are right in their position, that the words used are not to be interpreted literally, it would seem to be reasonable to hold that they were intended to except from the policy all cases of death caused by the voluntary act of the assured, when his deed of self-destruction was the result of intention, by a person knowing the nature and consequences of the act, although it may have been done under an insane delusion, which rendered the party morally and legally irresponsible, incapable of distinguishing between right and wrong, and which, by disturbing his reason and judgment, impelled him to its commission. If the suicide was an act of volition, however excited or impelled, it may in a just sense be said that he died by his own hand. But beyond this it would not be reasonable to extend the meaning of the proviso. If the death was caused by accident, by superior and overwhelming force, in the madness of delirium, or under any combination of circumstances from which it may be fairly inferred that the act of self-destruction was not the result of the will or intention of the party adapting means to the end, and contemplating the physical nature and effects of the act, then it may be justly held to be a loss not excepted within the meaning of the proviso. A party cannot be said to die by his own hand in the sense in which these words are used in the policy, whose self-destruction does not proceed from the exercise of an act of volition, but is the result of a blind impulse, of mistake or accident, or of other circumstances over which the will can exercise no control. (6) In seeking to ascertain the intention of parties, some weight is to be given to the practical results which would be likely to follow from the adoption of a particular construction of the words of a contract. It is reasonable to suppose that these were in contemplation of the insurers at the time the policy was issued. Certainly it is fair to infer that they intended to put some material limitations upon their liability by the insertion of this proviso. But if it is to be construed as including only cases of criminal self-destruction, it would rarely, if ever, effect this object. Those familiar with the business of insurance, and with the results of actions on policies of insurance

Supreme Court of Maine, in *Eastabrook v. Union Mutual*

in courts of law, know how difficult it is to establish a case of exemption from liability under an exception in a policy, where it depends on a question of fact to be decided by the verdict of a jury. If this is true in regard to ordinary claims under policies, it is obvious that the difficulty would be greatly enhanced in cases like the present, where it would be sufficient, in order to take a case out of the operation of the proviso, to prove that self-destruction was the result of insanity. It would not be hazardous to affirm that, in all cases where such an issue was to be determined by a jury between an insurance company and the representatives of the deceased, the act of suicide would be taken as proof of insanity. Such considerations were not likely to have escaped the intention of practical men in framing this general proviso; and in a doubtful case of construction, they are not to be overlooked in giving an interpretation to the words used by them.

(7) The learned counsel for the plaintiffs have insisted with great force on an argument drawn from the context, to show that the proviso was intended to embrace only a case of criminal self-destruction by a reasonable and responsible being. But it seems to us that the maxim *noscitur a sociis*, on which they rely, does not aid the construction for which they contend. The material part of the clause is, that the policy shall be void if the assured 'shall die by his own hand, or in consequence of a duel, or by the hands of justice, or in the known violation of any State, national, or provincial law.' Now the first and most obvious consideration suggested by other parts of this clause is, that in enumerating the causes of death which shall not be deemed to be within the risks covered by the policy, one of them is in terms made to depend on the existence of a criminal intention. It is a 'known violation of law' which is to avoid the policy. This tends very strongly to show that where an act producing death may be either innocent or criminal, if it is intended to except only such as involves a guilty intent, it is carefully so expressed in the proviso. The inference is very strong that if they designed to confine the exception in question to cases of criminal suicide, it would have been so provided in explicit terms. So far, the argument drawn from the context does not support the plaintiffs' claim. Take, then, another of the causes of death, death in a duel, enumerated in the proviso.

(8) It seems to us to be a *petitio principii* to assume that death in consequence of a duel necessarily implies an act for which the party would be criminally responsible. Why is not this part of the proviso open to the same argument as that which is urged in regard to the clause relating to self-destruction? A duel may be fought by a party acting under duress, or impelled thereto by an insane delusion, which might blind his moral perceptions and render him legally irresponsible. If so, then the same answer to a defence set up against a claim under the policy would be open under this clause, as the one now urged in behalf of the plaintiffs; and the argument founded on the assumption that a forfeiture under this part of the proviso necessarily involves a criminal violation of law, falls to the ground. Therefore the inference that a guilty intention is communicated from this branch of the proviso to that relating to death by the act of the assured, seems to us to be unfounded. The only remaining clause is that which provides for the case of death by the hands of justice. This undoubtedly implies that the person insured has been found guilty of a criminal act by a judicial tribunal, according to the established forms of law. But it is not correct to say that it involves the existence of a criminal intent, because it might be shown that the conviction of the assured was erroneous, and that he was in fact innocent of the crime for which he suffered the penalty of death. So far, therefore, as any

Life Insurance Company,¹ where it was held that the repre-

argument can be justly drawn from the connection in which the words as to self-destruction stand in relation to other parts of the proviso, it leads to the conclusion that it was not solely death occasioned by acts of the assured involving criminal intent or a wilful violation of law by a person morally and legally responsible, which was intended to be excepted from the risks assumed by the insurers; but that, with the exception of death in a known violation of law, the proviso embraces all cases where life is taken in consequence of the causes specified, without regard to the question, whether at the time the assured was amenable for his act, either in *foro conscientie* or in the tribunals of justice. (9) It may be added that a departure from the literal terms of a contract is always attended with great difficulty and danger, because it is apt to lead to great latitude of construction, and to give uncertainty to the language which the parties have adopted to express their meaning. It certainly never should be extended beyond the clear intent of the parties, as derived from other parts of the agreement, or the subject-matter to which the contract relates. This position may be illustrated by reference to another part of the policy declared on. The proviso which precedes that on which the present question has arisen contains a stipulation that the policy shall be void if the assured, without the consent of the defendants in writing, shall during certain portions of the year visit the more southerly parts of the United States, or shall pass without the settled limits of the United States. If the assured in a fit of insanity should wander from his home and go within the prohibited territory, would the policy be void? If he was taken prisoner and went thither with his captors, would he lose his claims under the policy? These and similar questions which might arise under other clauses of the policy, seem to show that it is more safe to adhere to the strict letter of the contract, and to hold parties to the salutary rule which requires them to express in clear and unambiguous terms any exceptions which they desire to engraft on the general words of a contract. (10) So far as the adjudicated cases bear on the question which we have considered in the present case, the weight of authority is against the claim of the plaintiffs under the policy. In the case of *Borradaile v. Hunter*, 5 Man. & Gr. 639, where the policy contained a proviso very similar to that found in the policy declared on, it was held that the policy was avoided, as the proviso included all cases of voluntary self-destruction, and was not limited to acts of criminal suicide. From this opinion there was a dissent by the Chief Justice. In *Clift v. Schwabe*, 3 C. B. 437, a similar decision was made by the Exchequer Chamber, two of the judges dissenting. These cases seem now to be regarded as having settled the law of England in conformity with the opinion of the majority of the judges. *Dufaur v. Professional Life Ass. Co.*, 25 Beav. 599, 602. A different opinion was arrived at in *Breasted v. Farmers' Loan and Trust Company*, 4 Hill (N. Y.), 74, and 4 Selden, 299, from which, however, several of the most learned justices of the Court of Appeals dissented. (11) In 1 Phil. Ins., sect. 895, it is stated that any mental derangement sufficient to exonerate a party from a contract would render a person incapable of occasioning the forfeiture of a policy under a clause like the one in question. In support of this proposition no authorities are cited except the cases above named of *Borradaile v. Hunter* and *Breasted v. Farmers' Loan and Trust Company*, as reported in 4 Hill. If it is intended by it to assert that the principle on which a contract made with an insane person is held to be void as to him, applies to this

¹ 54 Me. 224.

sentatives of an insane suicide might recover upon the policy, the facts being fully stated in the opinion. The policy provided that in case the insured should "die by his own hand, or in consequence of a duel, or by the violation of any State, national, or provincial law, or by the hands of justice," it should be void. The death was by suicide in a fit of insanity; and death under such circumstances was held not to be within the condition.¹

clause so as to exclude from its operation all cases of self-destruction occasioned by insanity, it seems to us that the position is untenable. The reason for the rule which exempts a person from liability on a contract into which he entered when insane is, that he is not deemed to have been capable of giving an intelligent assent to its terms. But this rule is not applicable where a contract is made with a person in the full possession of his faculties, and he subsequently, in a fit of insanity, commits a breach of it, or incurs a penalty under it. He is then bound by it. His mind and will have assented to it. No subsequent mental incapacity will absolve him from his responsibility on it, unless from its nature it implies the continued possession of reason and judgment and the action of an intelligent will. A party may be liable on an unexecuted contract, after he has lost the use of his mental faculties, as he may be held responsible *civiliter* for his torts. *Bagster v. Portsmouth*, 7 Dowl. & Ry. 614; *Weaver v. Ward*, Hob. 134; *Cross v. Andrews*, Cro. Eliz. 622. (12) To say that insanity exonerates a party from a forfeiture under such a proviso in a policy, is to assume that this was the intention of the parties when the contract of insurance was entered into. But if such was not the intention, then it follows that the assured gave an intelligent assent to a contract, by which he stipulated that if he took his own life voluntarily, knowing the consequences of his act, he would thereby work a forfeiture of his claim under the policy, although he may have acted under the influence of insanity in committing the suicidal act. So that, after all, we are brought back to the inquiry, what was the intention of the parties to the contract, in order to ascertain the true construction of the proviso. (13) The result to which we have come, after a careful and deliberate consideration of the question, during which we have felt most sensibly the very great difficulties and embarrassments which surround the subject, is that the plaintiffs are not entitled to recover. The facts agreed by the parties concerning the mode in which the plaintiffs' intestate took his own life leave no room for doubt that self-destruction was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it. Such being the fact, it is wholly immaterial to the present case that he was impelled thereto by insanity, which impaired his sense of moral responsibility, and rendered him to a certain extent irresponsible for his actions."

¹ The learned judge, after adverting to the diversity of judicial opinions, both in England and in this country, proceeds as follows: "In this conflict of authority, it may not be amiss to briefly examine the question, and to endeavor to determine what conclusions will best accord with the object of the policy and with the intent of the parties as ascertainable from the language upon the recognized principles of interpretation. *Appleton, C. J.*, in *Eastabrook v. Union Mut. Life Ins. Co.*, 54 Me. 224; *Kent, J.*, dissented, but delivered no opinion. An insurance upon life is of comparatively recent date. A creditor may insure upon

§ 312. The doctrine laid down in *Dean v. American Mut-*
the life of his debtor, or one may insure upon his own life for the benefit of his family. In no event can the person upon whose life the policy is effected be benefited by his own death. Death, whether by disease, by accident, or the result of insanity, is in each case within the general object of the policy. The terms 'suicide' and 'dying by one's own hand' are generally used synonymously. Sometimes one form of expression is used, and sometimes the other. They have the same meaning. Dying by one's own hand is but another form of expression for suicide. The phrase, 'die by one's own hand,' may include all cases of death by the person upon whose life the policy is effected, or it may receive limitations. If limitations, then the inquiry arises as to the extent of those limitations. The authorities concur in this, that the expression does not embrace all cases of death by one's own hand. If the insured kill himself by drinking poison, not being aware that it was poison; or by snapping a loaded pistol, ignorant that it was loaded; or by leaping from a window in the delirium of a fever, — it is conceded that he would not die by his own hand, within the meaning of the clause under consideration, though he might literally die by his own hand, that is, by his own act. 'It is to be observed,' remarks Tindal, C. J., in *Borradaile v. Hunter*, 'that the words of the proviso are the words not of the assured, but of the insurers, introduced by themselves for the purpose of their own exemption and protection from liability; both in reason and good sense, therefore, no less than upon the acknowledged principles of legal construction, they are to be taken most strongly against those who speak the words, and most favorably for the other party. For it is no more than just that, if the words are ambiguous, he whose meaning they are intended to express, and not the other party, shall suffer by the ambiguity.' That they are ambiguous is conceded, for the courts in no cases have given them a literal construction. When death is the result of insanity, it is equally the result of disease, for which the insane is in no respect responsible. It is a well-settled physiological principle 'that disturbed intelligence has the same relation to the brain that disordered respiration has to the lungs and pleura.' Death, then, by an insane suicide is as much death by disease as though it were death by fever or consumption. Death by accident or mistake, though by the party's own hand, is not within the condition. Death by disease is provided for by the policy. Insanity is disease. Death, the result of insanity, is death by disease. The insane suicide no more dies by his own hand, than the suicide by mistake or accident. If the act be not the act of a responsible being, but is the result of any delusion or perversion, whether physical, intellectual, or moral, it is not the act of the man. 'If they [the insurers] intended the exception to extend both to the case of felonious self-destruction, and self-destruction not felonious, they ought,' observes Tindal, C. J., in *Borradaile v. Hunter*, 'so to have expressed it clearly in the policy; and that, at all events, if they have left it doubtful on the face of the policy whether it is so confined or not, that doubt ought, in my opinion, to be determined against them; for it is incumbent on them to bring themselves within the exception, and, if their meaning remains in doubt, they have failed so to do.' The different English life insurance companies (when unwilling to incur the risk of suicidal insanity) have guarded against such risk by language clearly excluding it from the policy. Thus, the Equitable has the condition, 'if the insured shall die by his own hand, being at the same time sane or insane;' the Eagle, 'if he shall die by his own act, whether sane or insane.' In the policies of the Solicitors' and General Life Assurance, the condition is, if he die by his own act, 'whether felonious or not.' The policy in the clause under consideration refers to death by his own hand, or in consequence of a duel, or the violation of any

ual Life Insurance Company,¹ has since been adopted and

State, national, or provincial laws, or by the hands of justice. All the other cases after the first involve criminal delinquency. They involve intentional mis-doing. They assume criminal intention. They are cases where death occurs in consequence of committing a felony or other violation of law on the part of the insured. There must in all be moral, as well as legal, responsibility. *Noscitur a sociis* is a familiar maxim in the interpretation of covenants. The other members of the sentence, connected with the verb 'die,' imply death as the result of crime committed by a responsible being. The first of these conditions, to which the others refer, and with which they are connected, must equally with the others refer to a felonious death, to the case of *felto de se*, not to the case of a death without legal or moral blame, — the result of accident, mistake, or disease. The madman who in a fit of delirium commits suicide as much dies by his own hand as does the individual who accidentally and unintentionally takes his own life. They each die by their own hands, but without moral responsibility or legal blame. One is no more within the conditions of the policy than the other. In each case it should receive the same construction. That a jury would be likely to regard suicide as proof of insanity does not affect the conclusion. If suicide is to be regarded as evidentiary of insanity, as it unquestionably is in most cases, then they generally arrive at correct results. If it is not properly to be so regarded, it may be an argument against a trial by jury, that the tribunal is one which allows itself to be governed by its prejudices rather than by the proofs; but it is none against the construction of the policy that death by the hands of the insured, whether by accident, mistake, or in a fit of insanity, is to be governed by one and the same rule. Nor does the case of suicide, by one insane, fall within the danger to guard against the occurrence of which this condition was inserted. 'A policy,' observes Maule, J., in *Borradaile v. Hunter*, 'by which the sum is payable on the death of the person assured in all events, gives him a pecuniary interest that he should die immediately, rather than at a future time, to the extent of the excess of the value of a present payment over a deferred one, and offers a temptation to self-destruction to that extent. To protect the insurers against the increase of risk arising out of this temptation, is the object for which the condition is inserted.' The reason here given assumes, or presupposes, sanity on the part of the insured. It implies a motive acting on a sane mind, for sanity is in all cases to be presumed. But, in fact, there is very slight foundation for any such reasoning. The person whose life is insured never receives money after his death. Suicide for the benefit of others is rare, exceptional, and Quixotic. The love of life, the strongest sentiment of our nature, affords reasonable security against a danger so remotely probable. An insane man would be little likely to calculate the difference in value between a payment to be made immediately and one indefinitely deferred, and kill himself that some one else might receive the money at an earlier date in consequence of his committing suicide. The evidence affords not the slightest indication that any such motive had any influence in the present case. Where the policy is on the life of a mariner, as in the one under consideration, 'the insurance can be no inducement to a criminal act, and may be reasonably construed to cover this as well as every other risk. There is, indeed, no reason why it should not do so; for the general tables of mortality, which form the basis of the calculations upon which the policy is founded, include this as well as every other cause of death, so that the particular risk is actually insured against.'" *Bunyon on Life Insurance*, 73.

¹ 4 Allen (Mass.), 96.

followed by Mr. Justice McKennan in the Circuit Court of the United States for the Western District of Pennsylvania,¹ and in Kentucky.² In the case from Kentucky the following instructions were held to be erroneous: "That although the jury may be satisfied that Leslie C. Graves, whose life was insured by the defendant, committed suicide, and that when he did his intellect was unimpaired, and that he knew it was forbidden both by moral and human law; yet if they believe, from all the evidence, that at the instant of the commission of the act his will was subordinated by an uncontrollable passion or emotion, causing him to do the act, it was an act of moral insanity," and would not avoid the policy. In England, the rule laid down by the majority of the judges in the cases of *Borradaile v. Hunter and Clift v. Schwabe* was followed in *White v. The British Empire Mutual Life Assurance Company*,³ in which the Vice-Chancellor (Malins) took occasion to intimate that that opinion was so clearly the better law that he did not wish to hear any argument on behalf of the defendants. In *Stormont v. Waterloo Life and Casualty Assurance Company*,⁴ the insured committed suicide by throwing himself out of the window, and the court told the jury that the question was, did the assured know that he was throwing himself out of the window? If he did, no recovery could be had under the policy. Otherwise, if he did not. Such, also, appears to be the rule in Ohio⁵ and in Maryland.⁶ It is also said to be the law in Germany, Holland, and France.⁷

§ 313. Later the Supreme Court of Massachusetts, having occasion to reconsider the question,⁸ adhered to its former decision, and thus stated the position of the question.

¹ *Nimick v. Mut. Benefit Life Ins. Co.*, 3 Brewster (Pa.), 502; s. c. Am. Law Leg. Feb. 1871. So also by Cadwallader, J., C. Ct. (Pa.) in *Snyder v. Mut. Life Ins. Co.*, 4 Big. Life & Acc. Ins. Cas. 424.

² *St. Louis Mut. Life Ins. Co. v. Graves*, 6 Bush (Ky.), 268.

³ 38 L. J. N. S. Ch. 53.

⁴ 1 F. & F. *Nisi Prius*, 22.

⁵ *Hartmann v. Connecticut, &c. Ins. Co.*, 4 Ins. L. J. 159.

⁶ *Knickerbocker, &c. Ins. Co. v. Peters*, 42 Md. 414.

⁷ 6 Ins. L. J. 719.

⁸ *Cooper v. Massachusetts Mut. Life Ins. Co.*, 102 Mass. 227.

"The proviso in the policy is, that it shall be void if the assured 'shall die by suicide.' The plaintiff offered to prove that the assured, at the time of committing the act of self-destruction, was insane; that he acted under the impulse of insanity; and that his act of self-destruction was the direct result of his insanity. The question presented is, whether if these facts are true, the act of self-destruction avoids the policy, within the terms of the proviso. The subject has been so fully discussed in the cases cited that further argument is needless. We need only collate the cases.

"In *Borradaile v. Hunter*¹ the words were, 'if the assured should die by his own hand.' He drowned himself in the Thames; and the jury found that he did it voluntarily, but that he was not capable of judging between right and wrong. It was held that the proviso was not limited to acts of felonious suicide, and that the policy was void. Tindal, C. J., dissented. But the jury were instructed that it must appear that the assured was conscious of the probable consequences of his act, and did it for the express purpose of destroying himself voluntarily, having at the time sufficient mind and will to destroy himself.

"In *Clift v. Schwabe*² the words were, 'should commit suicide.' The assured swallowed a quantity of sulphuric acid, sufficient to occasion death, for the purpose of killing himself, of which he died the next day. It was held by Parke and Alderson, BB., Patteson, J., and Rolfe, B., to be immaterial whether he was a responsible agent. Pollock, C. B., and Wightman, J., dissented. But Alderson, B., says the words do not apply to cases in which the will is not exercised at all, as when death results from an accident or delirium, but when the destruction is voluntary, though the will may be perverted.

"In *Dean v. American Insurance Company*,³ the words were, like those in *Borradaile v. Hunter*, 'shall die by his own hand.' The assured cut his throat with a razor. The plaintiff, however, alleged and offered to prove that the act whereby the death was caused was the direct result of in-

¹ Man. & Gr. 639.
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² 3 C. B. 439.

³ 4 Allen (Mass.), 96.

sanity; that the insanity was what is called suicidal depression, impelling him to take his life, and that suicide is the necessary and direct result of such insanity or disease; and it was held that this avoided the policy. But Bigelow, C. J., in giving the opinion, adverts to the word 'suicide,' and avoids discussing its signification; thereby leaving the present case undecided by this court. But he says that if the death is caused in the madness of delirium, or under any combination of circumstances from which it may be fairly inferred that the act of self-destruction was not the result of the will and intention of the party, adapting the means to the end, and contemplating the physical nature and effects of the act, it would not be within the policy. This limitation is, in substance, the same with that which is quoted from the other cases cited.

"In *Eastabrook v. Union Insurance Company*,¹ the words were 'shall die by his own hand.' The jury found that the self-destruction was the result of a blind and irresistible impulse over which the will had no control, and was not an act of volition. It was held that this did not avoid the policy; and Appleton, C. J., in a very elaborate opinion, says the decision was in entire conformity with the law as stated in *Dean v. American Insurance Company*, referring to the limitation stated above. But Kent, J., dissented.

"In *Breasted v. Farmers' Loan and Trust Company*,² the words were 'should die by his own hand.' It was held by a majority of the Court of Appeals, three of the justices dissenting, that, if the assured was insane, and incapable of discerning between right and wrong, his suicide did not avoid the policy. This decision is at variance with the other authorities cited, and is contrary to our own interpretation of the same words in *Dean v. American Insurance Company*.

"Upon a careful consideration of the elaborate discussion of the matter in the cases above cited, by the dissenting judges as well as by those in the majority, we think that, as applied to this case, there is no substantial difference of sig-

¹ 54 Me. 224.

² 4 Seld. (N. Y.) 299.

nification between the phrases 'shall die by his own hand,' 'shall commit suicide,' and 'shall die by suicide;' and that they include self-destruction under the influence of insanity within the limitation above stated. In the present case, there was no offer to prove madness of delirium, or that the act of self-destruction was not the result of the will and intention of the party, adapting the means to the end, and contemplating the physical nature and effects of the act. The insanity therefore was not such as to take the case out of the proviso."

§ 314. In *Fowler v. Mutual Life Insurance Company*,¹ the facts made it so plain that the insured was a voluntary suicide, that the court refused to submit the question whether the act was an insane or an involuntary one to the jury, after intimating that the question would be, if there were any question on the evidence, whether the act was voluntarily done, without reference to the question whether the insured was, or was not, a responsible moral agent.

§ 315. In *Mallory v. Travelers' Insurance Company*,² the court instructed the jury that if the condition of the deceased at the time of death was such that he could not distinguish between right and wrong, if it was such that he did not know that he was doing an act which would produce death, the plaintiff might recover, — a rule indicating a tendency to adopt the doctrine of the Massachusetts cases, and said, on appeal to the general term of the same court, to have been an instruction quite as favorable to the defendants as the rule in New York would allow.

§ 316. In the case of *Van Zandt v. Mutual Benefit Life Insurance Company*,³ in New York, the court adheres to the rule theretofore laid down in that State that the suicide must be felonious, and by one who was able to appreciate the moral effect and consequences of his act, in order to prevent a recovery, and distinctly refused to sustain the doctrine

¹ 4 Lans. (N. Y.) 202.

² N. Y. Sup. Ct. 1870; s. c. 47 N. Y. 52, where, however, this ruling, it not having been excepted to, was not considered.

³ New York Supreme Court, Gen. Term, 4th Dept., June, 1872.

that if the insured destroy his own life voluntarily and wilfully, having at the time sufficient power of mind and reason to understand the physical nature and consequences of such an act, and having the purpose and intention to cause death by the act, he cannot recover. And it was also held in the same case that there was no essential difference whether the provision was "in case he shall die by his own hand, in or in consequence of a duel, or by reason of intemperance," or "in case he shall die by his own hand in consequence of a duel," &c.¹ In a still later case the same court held that an

¹ On appeal, the court, after explaining that Breasted's case is not opposed to *Borradaile v. Hunter*, used the following language: (1) "It is contended that the case of *Breasted v. The Farmers' Loan and Trust Company*, 4 Hill, 73, and 8 N. Y. 299; 1 Big. Life & Acc. Ins. Cas. 341, 343, establishes a different doctrine in this State. In 4 Hill, 73, the case came before the court on demurrer to a replication, which averred that when the assured drowned himself he was of unsound mind, and wholly unconscious of the act. Nelson, C. J., in delivering the opinion of the court, placed the decision upon the ground that, speaking legally, such drowning was no more the act of the assured than if he had been impelled by irresistible physical power. The learned judge also intimates that the connection in which the words stand in the policy would seem to indicate that they were intended to express a criminal act of self-destruction, as they are found in conjunction with the provisions relating to the termination of the life of the insured in a duel, or his execution as a criminal. But he does not place the decision on that ground, nor could it well stand there if the language of the policy in that case was the same as in the present, because in this policy the provisions in conjunction with which the words are used relate as well to acts not criminal as to criminal acts; the same sentence embracing the visiting of prohibited territories, engaging in service upon the seas, or in military service, death from intemperance, &c. The maxim *noscitur a sociis* cannot, therefore, afford a reliable rule of interpretation. See opinion of Grover, J., in *Bradley v. Mutual Benefit Life Insurance Company*. 45 N. Y. 434; 2 Big. Life & Acc. Ins. Cas. 117. In 8 N. Y. 299, the case of *Breasted* came before the Court of Appeals on appeal from the decision of the Supreme Court upon the demurrer, and also upon a judgment on the report of the referee on issues of facts which had been joined in the action. The referee had found that the assured threw himself into the river while insane, for the purpose of drowning himself, not being mentally capable at the time of distinguishing between right and wrong. There was no finding that the act was voluntary or wilful. Such a finding would have established that the man was not deprived of his power of will, and that he could have restrained himself from the commission of the act, and would have negatived any insane impulse which he could not resist. Bearing in mind the well-established principles upon which judgments based upon findings of fact by a court or referee are reviewed in this appellate tribunal, and that in regard to matters of fact all intendments of which the evidence in the case, or the findings, are fairly susceptible, must be in support of such judgments, and that the finding in general terms of insanity may have comprehended a deprivation, not merely of moral sense, but of any rational will, the court could hardly have come to any other conclusion than it did. The

act done under the control of an insane impulse caused by

whole reasoning of the opinion of Willard, J., which prevailed over the dissents of Garduer, Jewett, and Johnson, JJ., shows that he regarded the point raised upon the demurrer, viz. that the assured at the time of destroying his own life was of unsound mind and wholly unconscious of the act, and that presented by the finding, as identical, and that the learned judge regarded the finding as establishing that the insured was so insane as not to be capable of forming an intention, and that he had not sufficient mind to concur in the act. The learned judge does not undertake to overrule the cases of *Borradaile v. Hunter and Clift v. Schwabe*, but expressly distinguishes those cases from the one before him by pointing out that they assumed that the act was voluntary, which fact he holds that the finding in the case of *Breasted* failed to establish. A finding, in the language of the request in the present case, that the deceased had sufficient power of mind and reason to understand the physical nature and consequences of the act, and that he committed it voluntarily and wilfully, and in pursuance of a purpose and intention thereby to cause his own death, would have established that insanity did not exist to such a degree as to prevent him from forming an intention, or being conscious of the act he was doing. It would have established that his mind did concur with the act, and that this, being voluntary, was not the result of any insane impulse or want of power of self-control. Whether so much power of reasoning and of self-control could be left in a mind so impaired as to be incapable of appreciating the moral obliquity of the crime of suicide, is rather a scientific than a legal question. (2) Judge Willard, in the *Breasted* case, 8 N. Y. 299, 305, expresses the opinion that a man so insane as to be incapable of discerning between right and wrong can form no intention. This, it must be observed in passing, is a much broader proposition than that the failure to appreciate the wrong of a particular act evinces a total deprivation of reason. The loss of moral sense, even to that extent, in one who had previously possessed it, would undoubtedly be a fact bearing strongly upon the question whether he retained his other faculties. But in the practical administration of justice in cases of this description, it seems to us a dangerous doctrine to hold that the attention of the jury should be directed principally to the degree of appreciation which the deceased had of the moral nature of his act, and that this question, most speculative and difficult of solution, should be made the test by which it should be determined whether he had knowingly and voluntarily violated the condition of his insurance. The real question is, whether he did the act consciously and voluntarily, or whether from disease his mind had ceased to control his actions. Supposing a man to be in possession of his will and of the ordinary mental faculties necessary for self-preservation, but that his mind has become so morbidly diseased on the subject of suicide that he cannot appreciate its moral wrong, and in this condition of mind he takes his own life voluntarily and intentionally, perhaps with the very object of securing to his family the benefits of an insurance upon his life, it is difficult to say that this is not a death by his own hand within the meaning of the policy. It has been doubted whether public policy would permit an insurance covering the case of intentional suicide by the assured while sane. But however this may be, no rational doubt can be entertained that a condition exempting the insurers from liability in case of the death of the assured by his own hand, whether sane or insane, would be valid if mutually agreed upon between the insurer and the insured. When nothing is said in the policy with respect to insanity, the words 'die by his own hand' in their literal sense comprehend all cases of self-destruction. The exceptions which have been engrafted

disease and derangement of the intellect, and deprivation of

upon these words by judicial decisions must rest upon the ground that the excepted cases could not have been within the meaning of the parties to the policy. The intent on the part of the insurer in inserting the condition is evident. The policy creates in the assured a pecuniary interest in his own death. To a man laboring under the pressure of poverty and the urgent wants of a dependent family, or of inability to discharge sacred pecuniary obligations or other similar causes, the policy offers a temptation to self-destruction. To protect the insurers against the increase of risk arising out of this temptation is the object for which the condition in question is inserted. Per *Maule, J.*, 5 M. & Gr. 653. The condition ought, therefore, to be so construed as to exclude only those cases in which these motives could not have operated, such as accident or delirium. *Ibid.* So far as considerations of public policy have any place in determining such a question, they are undoubtedly in favor of confining the exceptions to the condition to cases in which the self-destruction is clearly shown to have been accidental or involuntary. (3) I do not find that any of the cases have gone so far as to adjudicate that a mere want of capacity to appreciate the moral wrong involved in the act, when it was voluntary and intentional, unaccompanied by any want of appreciation of its physical nature and consequences, or by any insane impulse, or want of power of will or self-control, is sufficient to take a case out of the proviso. (4) The contrary has been held in several cases, and the doctrine of *Borradaile v. Hunter* adopted. *Dean v. The American Mut. Life Ins. Co.*, 4 Allen, 96; 1 Big. Life & Acc. Ins. Cas. 195; *Cooper v. The Massachusetts Mutual Life Ins. Co.*, 102 Mass. 227; 1 Big. Life & Acc. Ins. Cas. 758; *Nimick v. Insurance Co.*, 10 Am. Law Reg. N. S. 101, 102; 1 Big. Life & Acc. Ins. Cas. 689; *Gay v. Union Mutual Life Ins. Co.*, 9 Blatchf. 142; 2 Big. Life & Acc. Ins. Cas. 4; *Wharton & Stille, Med. Jur.* § 240; *Fowler v. The Mutual Life Ins. Co. of N. Y.*, 4 Lans. 202; 3 Big. Life & Acc. Ins. Cas. 673. In the case of *St. Louis Mutual Insurance Company v. Graves*, 6 Bush (Ky.), 268; 1 Big. Life & Acc. Ins. Cas. 736, the Court of Appeals of Kentucky was equally divided. (5) The only case cited in support of the respondents' view, in addition to the case of *Breasted v. The Farmers' Loan and Trust Company*, which has already been commented upon, is the case of *The Mutual Life Insurance Company v. Terry*, 15 Wall. 580; 3 Big. Life & Acc. Ins. Cas. 819. But it will be found upon an examination of that case that the question of the capacity of the deceased to appreciate the moral character of the act was not involved, and that all that is said upon that subject in the opinion is *obiter*. The judge at the trial expressly instructed the jury that it was not every degree of insanity which would so far excuse the party taking his own life as to make the party insuring liable; but that the mind of the deceased must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act he was committing, or he must have been impelled by some insane impulse which the reason that was left him did not enable him to resist. Not a word was said to the jury in respect to his consciousness of the moral quality of the act. 1 Dill. C. C. R. 404. The requests to charge which were refused required the submission to the jury only of the question of the capacity of the deceased to understand the nature and consequences of the act, and did not require them to find that it was voluntary, and therefore did not exclude the hypothesis of an insane impulse which he could not resist. (6) The questions raised by the exemptions in that case differ widely from the present, and the judgment therein is not inconsistent with the doctrine of *Borradaile v. Hunter*, and the other cases cited. The opinion delivered in the Supreme Court

the capacity of governing the conduct in accordance with reason, could not be regarded as voluntary, or within the proviso against self-destruction.¹

§ 317. In *Isett v. American Life Insurance Company*,² the insured committed suicide by shooting himself with a pistol, and the policy provided that if the insured "die by his own hand" the insurer should not be liable. The jury were instructed that if the insured at the time of his death was conscious that his death would follow the discharge of the pistol in his hands, though he was laboring under mental depression or disturbance of mind, or if he destroyed his life because he was suffering from some physical infirmity, and for the purpose of escaping from such infirmity, there could be no recovery; that sanity was to be presumed and insanity to be proved by the party alleging it, and that suicide is not of itself proof of insanity, but to be considered with other facts and circumstances in the case.³ On appeal, the Supreme Court say: "We understand the fair import of the instruction to be this: if the insured possessed sufficient

in the Terry case contains the same general language, which goes far beyond the charge in the Circuit Court, and was not necessary to sustain the judgment. I refer to that part of the opinion which is relied upon in the points of the respondent in this case, and in which the learned judge says that 'if the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist,' the insurer is liable. (7) The precise effect of this passage is not very clear to us, as it includes several conditions which can hardly coexist. It can be conceived that the act might have been voluntary and the self-destruction intentional, though the assured failed to appreciate its moral character; but it is difficult to conceive how the act could have been voluntary and intentional when the faculties of the deceased were so impaired that he was not able to understand 'the general nature, consequences, and effect of the act he was about to commit,' or when he was impelled thereto by an insane impulse which he had not the power to resist. (8) Even if the decision in the Terry case were an authority binding upon us, we should not regard it as overruling the case of *Borradaile v. Hunter*, and kindred cases. The first request to charge was framed in accordance with the doctrine of those cases, and we think that it should have been granted."

¹ *Newton v. Mutual Benefit Life Ins. Co.*, 76 N. Y. 426.

² *Court of Common Pleas, Blair County, Penn.*, May, 1872, 1 Ins. L. J. 715.

³ See also *Stratton v. North American, &c. Ins. Co. (C. C. P. Pa.)*, 7 Leg. Gaz. 313; s. c. 5 Big. Life & Acc. Ins. Cas. 504.

mental capacity to form an intelligent intent to take his own life, and was conscious that the act he was about to commit would effect that object, it avoided the policy. If, however, his mind was so far impaired that he was incapable of forming such an intent, and was unconscious of the effect of his action upon his life, a recovery could be had. So understanding it, we cannot say there is any error therein." The court further observe that the cases of *Hartman v. Keystone Insurance Company*¹ is not in conflict with the instruction, and as the question based upon the distinction between a perception of the physical and moral character of acts does not arise, they decline to go into that question.² In a subsequent case in the Common Pleas, suicide being defined as malicious self-murder, the rule was stated as follows: "If the insured was impelled to the act by an insane impulse, which the reason which was left in him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, he did not die by his own hand."³ And in a still later case the court, while admitting that the "preponderance of decisions" is in favor of the English doctrine, express their preference for the doctrine of Terry's case.⁴ Suicide implies self-destruction by a person of sound mind.⁵

§ 318. In *Gay v. Union Mutual Life Insurance Company*, tried before Woodruff and Shipman, JJ.,⁶ where the insured shot himself in the head with a pistol, the jury were charged that if the insured at the time he fired the pistol was conscious of the act he was committing, intended to take his own life, and was capable of understanding the nature and consequences of the act, the insurers were not liable; that

¹ 21 Pa. St. 466; *post*, § 323.

² 74 Pa. St. 176.

³ *Bank of Oil City v. Guardian, &c. Ins. Co.*, 4 Ins. L. J. 472.

⁴ *Connecticut, &c. Ins. Co. v. Groom*, 86 Pa. St. 92.

⁵ *Ibid.* See also remarks of Bigelow, C. J., *ante*, § 310; and *Phadenhauer v. Germania Ins. Co.*, 7 Heisk. (Tenn.) 567, where the policy used the words "by suicide or by his own hands." See also *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284.

⁶ 9 Blatchf. C. Ct. (U. S.) 142.

if the act was thus committed, it was immaterial whether he was capable of understanding its moral aspects, or of distinguishing between right and wrong; and that if he was not thus conscious, or had no such capacity, but acted under an insane delusion overpowering his understanding and will, or was impelled by an uncontrollable impulse which neither his understanding nor will could resist, the insurers were liable.

§ 319. In *Terry v. Life Insurance Company*,¹ Mr. Justice Miller ruled that there is no presumption of law that self-destruction is caused by insanity, and stated the conclusions at which he had arrived as the result of an examination of the authorities, in his charge to the jury.

§ 320. The doctrine of this case was affirmed on appeal to the Supreme Court of the United States,² Mr. Justice Hunt delivering the opinion of the court.

¹ 1 Dill. C. Ct. (U. S.) 8th Circuit, 403. The judge said: "It being agreed that the deceased destroyed his life by taking poison, it is claimed by the defendants that he 'died by his own hand,' within the meaning of the policy, and that they are therefore not liable. This is so far true, that it devolves on the plaintiff to prove such insanity on the part of the deceased, existing at the time he took the poison, as will relieve the act of taking his own life from the effect which, by the general terms used in the policy, self-destruction was to have, namely, to avoid the policy. It is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring liable. To do this, the act of self-destruction must have been the consequence of insanity, and the mind of the deceased must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing. If he was impelled to the act by an insane impulse, which the reason which was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, then the company was liable. On the other hand, there is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity; and if you believe, from the evidence, that the deceased, although excited or angry, or distressed in mind, formed the determination to take his own life, because in the exercise of his usual reasoning faculties he preferred death to life, then the company is not liable, because he died by his own hand within the meaning of the policy."

² *Mnt. Life Ins. Co. v. Terry*, 15 Wall. (U. S.) 580. The judge here says: "This action was brought to recover the sum of two thousand dollars, claimed to be due upon a policy of insurance on the life of George Terry, made and issued to the plaintiff, his wife. The policy contained a condition, of which a portion was in the following words, viz.: 'If the said person whose life is hereby insured . . . shall die by his own hand, . . . this policy shall be null and void.' Within the terms of the policy George Terry died from the effects of poison taken by him. Evidence was given tending to show that at the time he took the poison he was insane. Evidence was also given, tending to show that at that time he was sane,

§ 321. **Mistake; Accident.** — In the Equitable Life Assur-

and capable of knowing the consequences of the act he was about to commit. Thereupon the counsel for the defendant asked the court to instruct the jury, 1. If the jury believe, from the evidence in the case, that the said George Terry destroyed his own life, and that, at the time of self-destruction, he had sufficient capacity to understand the nature of the act which he was about to commit, and the consequences which would result from it, then, and in that case, the plaintiff cannot recover on the policy declared on in this case. 2. That if the jury believe from the evidence that the self-destruction of the said George Terry was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it, then, and in that case, it is wholly immaterial in the present case that he was impelled thereto by insanity, which impaired his sense of moral responsibility, and rendered him, to a certain extent, irresponsible for his action. Which instructions, and each one of said instructions, the court refused to give to the jury, but the court did charge the jury as follows. [See preceding section.] . . . The request proceeds upon the theory that if the deceased had sufficient mental capacity to understand the nature and consequence of his act, — that is, that he was about to take poison, and that his death would be the result, — he was responsible for his conduct, and the defendant is not liable; and the fact that his sense of moral responsibility was impaired by insanity does not affect the case. The charge proceeds upon the theory that a higher degree of mental and moral power must exist; that although the deceased had the capacity to know that he was about to take poison, and that his death would be the result, yet if his reasoning powers were so far gone that he could not exercise them on the act he was about to commit, its nature and effect, or if he was impelled by an insane impulse which his impaired capacity did not enable him to resist, he was not responsible for his conduct, and the defendant is liable. It may not be amiss to notice that the case does not present the point of what is called emotional insanity, or *mania transitoria*; that is, the case of one in possession of his ordinary reasoning faculties, who allows his passions to convert him into a temporary maniac, and while in this condition commits the act in question. This case is expressly excluded by the last clause of the charge, in which it is said that anger, distress, or excitement does not bring the case within the rule if the insured possesses his ordinary reasoning faculties. The case of *Borradaile v. Hunter*, [5 Man. & Gr. 639], is cited by the insurance company. The case is found also in 2 Bigelow's Life and Accident Insurance Cases, p. 280, and in a note appended are found the most of the cases upon the subject before us. The jury found in that case that the deceased voluntarily took his own life, and intended so to do, but at the time of committing the act he was not capable of judging between right and wrong. Judgment went for the defendant, which was sustained upon appeal to the full bench. The counsel for the company argued that where the act causing death was intentional on the part of the deceased, the fact that his mind was so far impaired that he was incapable of judging between right and wrong did not prevent the proviso from attaching; that moral or legal responsibility was irrelevant to the issue. The court adds: 'It may very well be conceded that the case would not have fallen within the meaning of the condition had the death of the assured resulted from an act committed under the influence of delirium, or if he had in a paroxysm of fever precipitated himself from a window, or, having been bled, removed the bandages, and death, in either case, had ensued. In these and many other cases that might be put, though, strictly speaking, the assured may be said to have

ance Society *v. Paterson*,¹ the insured had taken laudanum

died by his own hands, the circumstances clearly would not be such as the parties contemplated when the contract was entered into.' In delivering the opinion of the court, Erskine, J., says all that the 'contract requires is, that the act of self-destruction should be the voluntary and wilful act of a man having at the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by that act, and the question, whether at the time he was capable of understanding the moral nature and quality of his purpose, is not relevant to the inquiry further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself.' Chief Justice Tindal dissented from the judgment. In speaking of the verdict, he says: 'It is not, perhaps, to be taken strictly as a verdict that the deceased was *non compos mentis* at the time the act was committed, for if the latter was the meaning of the jury, the case would then fall within that description mentioned in the argument to be without the reach of the proviso, namely, the case of death inflicted on himself by the party while under the influence of frenzy, delusion, or insanity.' This authority was followed in *Clift v. Schwabe*, 3 C. B. 437, where it was substantially held that the terms of the condition included all acts of voluntary self-destruction, and that whether the party is a voluntary moral agent is not in issue. These decisions expressly exclude the question of mental soundness. They are in hostility to the tests of liability or responsibility adopted by the English courts in other cases, from Coke and Hale onwards. Coke said, 'A little madness deprives the lunatic of civil rights or dominion over property, and annuls wills.' But, to exempt from responsibility for crime, he says, 'Complete ignorance of the knowledge of right and wrong must exist.' Lord Mansfield holds the legal test of a sound mind to be the knowledge of right and wrong, good and evil; of which the converse is ignorance of knowledge of right and wrong, of good and evil. Lord Lyttleton held the test to be the state called *compos mentis*, or sound mind. Lord Erskine, in his Defence of Hadfield, defined it to be the absence of any practicable delusion traceable to a criminal or immoral act. In 1 Prichard, p. 16 (on the different forms of insanity), will be found the somewhat lengthy definition of insanity by Lord Lyndhurst, 1 Shelf. Lun. 46. The English judges refuse to apply to the act of the insured in causing his death the principles of legal and moral responsibility recognized in cases where the contract, the last will, or the alleged crime of such person may be in issue. . . . There is a conflict in the authorities which cannot be reconciled. The propositions embodied in the charge before us are in some respects different from each other, but in principle they are identical. They rest upon the same basis, the moral and intellectual incapacity of the deceased. In each case the physical act of self-destruction was that of George Terry. In neither was it truly his act. In the one supposition he did it when his reasoning powers were overthrown, and he had not power or capacity to exercise them upon the act he was about to do. It was in effect as if his intellect and reason were blotted out or had never existed. In the other, if he understood and appreciated the effect of his act, an uncontrollable impulse, caused by insanity, compelled its commission. He had not the power to refrain from its commission, or to resist the impulse. Each of the principles put forth by the judge rests upon the same basis, that the act was not the

¹ 41 Ga. 338; s. c. 5 Am. Rep. 535. See also *post*, §§ 325, 514.

while drunk. The plaintiff claimed that it was by mistake;

voluntary, intelligent act of the deceased. The causes of insanity are varied as the varying circumstance of man.

“ ‘ Some for love, some for jealousy,
For grim religion some, and some for pride,
Have lost their reason ; some for fear of want,
Want all their lives ; and others every day,
For fear of dying, suffer worse than death.’ ”

[Armstrong on Health, book iv. ver. 113-118. Cited in 1 Shelf. Lun. In. 43.]

“ When we speak of the ‘ mental condition ’ of a person we refer to his senses, his perceptions, his consciousness, his ideas. If his mental condition is perfect, his will, his memory, his understanding are perfect, and connected with a healthy bodily organization. If these do not concur, his mental condition is diseased or defective. Excessive action of the brain whereby the faculties become exhausted, a want of proper action whereby the functions become impaired and diminished, the visions, delusions, and mania which accompany irritability, or the weakness which results from an excess of vital functions, indigestion and sleeplessness, are all a result of a disturbance of the physical system. The intellect and intelligence of man are manifested through the organs of the brain, and from these, consciousness, will, memory, judgment, thought, volition, and passion, the functions of the mind do proceed. Without the brain these cannot exist. With an injured or diseased brain, their powers are impaired or diminished. We have not before us the particular facts on which the question of the sanity of Terry was presented. We may assume that proof was given upon which the propositions of the charge were based. We do not know whether he was sleepless, unduly excited, or unnaturally depressed ; whether he had abandoned his accustomed habits and pursuits and adopted new and unusual ones ; from a quiet, orderly man, he had become disorderly, vicious, or licentious ; whether his fondness for his wife and children had changed to dislike and abuse ; or jealousy, pride, the fear of want, the fear of death had overtaken him. He may have realized the state supposed by the counsel in arguing *Borradaile v. Hunter*, viz. that his death might have resulted from an act committed under the influence of delirium, or that in a paroxysm of fever he might have precipitated himself from a window, or having been bled he might have torn away the bandages. Whether he swallowed poison, or did the other insane acts, might result from the same condition of body and mind. Delirium, fever, tearing away the bandages for preserving the life, the taking of poison, in a case like that before us, are all results of bodily disease. If bodily disease in these, or other forms, overthrew Terry’s reasoning faculties, in other words, destroyed his consciousness, his judgment, his volition, his will, he remained the form of the man only. The reflecting, responsible being did not exist. In the language of the successful counsel in *Borradaile v. Hunter*, ‘ in these and many other cases, though, strictly speaking, the assured may be said to have died by his own hands, the circumstances clearly would not be such as the parties contemplated when the contract was entered into.’ That form of insanity called impulsive insanity, by which the person is irresistibly impelled to the commission of an act, is recognized by writers on this subject. It is sometimes accompanied by delusions, and sometimes exists without them. The insanity may be patent in many ways, or it may be concealed. We speak of the impulses of persons of unsound mind. They are manifested in every form, — breaking of windows, destruction of furniture, tearing of clothes, firing of houses, assaults, murders, and suicides. These cases are to be carefully distinguished from those

and the court said there must be an intent to commit suicide, and if the intent exists, the fact that the man is maulin from drink, and could have no very intelligent conception of his surroundings, does not help the case. Death from laudanum, taken by a drunken man with the intent to de-

where persons in the possession of their reasoning faculties are impelled by passion merely in the same direction. [See Blundford on Insanity, — "Impulsive Insanity."] Dr. Ray, cited by Fisher, approves the charge of the judge in Haskell's case, where he says: "The true test lies in the word *power*. Has the defendant in a criminal case the power to distinguish right from wrong, *and the power to adhere to the right and avoid the wrong?*" Fisher on Insanity, p. 83. The question of sanity has usually been presented upon the validity of an agreement, the capacity to make a will, or upon responsibility for crime. If Terry had made an agreement under the circumstances stated in the charge, a jury or court would have been justified in pronouncing it invalid. A will then made by him would have been rejected by the surrogate if offered for probate. If upon trial for a criminal offence, upon all the authorities, he would have been entitled to a charge that, upon proof of the facts assumed, the jury must acquit him. [Freeman v. People, 4 Denio, 9; Willis v. People, 32 N. Y. 715, 719; Seamen's Friend Soc. v. Hopper, 33 id. 619; The Marquis of Winchester's Case, Coke's Reports, 3d volume, 303 or part vi. 23 a; Combe's Case, Moore (folio), 759.] We think a similar principle must control the present case, although the standard may be different. We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable. In the present instance, the contract of insurance was made between Mrs. Terry and the company, the insured not being in form a party to the contract. Such contracts are frequently made by the insured himself, the policy stating that it is for the benefit of the wife, and that in the event of death the money is to be paid to her. We see no difference in the cases. In each it is the case of a contract, and is to be so rendered as to give effect to the intention of the parties. Nor do we see any difference for this purpose in the meaning of the expressions, 'commit suicide,' 'take his own life,' or 'die by his own hands.' With either expression, it is not claimed that accidental self-destruction, death in endeavoring to escape from the flames, or the like, is within the proviso. The judgment must be affirmed." Mr. Justice Strong dissented. This case, of course, gives the rule for the Federal courts. And perhaps it would be followed in Michigan, John Hancock, &c. Ins. Co. v. Moore, 34 Mich. 41; and Louisiana, Phillips v. Louisiana Ins. Co., 26 La. An. 404. And it is distinctly adopted in Tennessee, Phadenhauer v. Germania Ins. Co., 7 Heisk. 567, and Scheffer v. National Ins. Co., 25 Minn. 534; and has also been followed in Vermont. Hathaway v. National Life Ins. Co., 48 Vt. 335.

stroy life, would be "dying by his own hands," while without that intent, and by accident or mistake, it would not.¹ And in *Fowler v. Mutual Life Insurance Company*,² the facts showed such a case of deliberate suicide that the court refused to allow the question of insanity, or of voluntary or involuntary suicide, to go to the jury, and directed a verdict for the defendant.

§ 322. **Suicide; Sane or Insane.** — [An insurance company may lawfully stipulate for forfeiture if the insured takes his own life while insane.³ But it must be very careful about the wording of the provision, or the courts will sail round it. The clause "under any circumstances die by his own hand" is to be understood as though it read "die by his own hand;" the phrase "under any circumstances" is too vague and indefinite to serve any purpose. The meaning of the clause "die by his own hand" has been fixed by the law. It is synonymous with "suicide." It means criminal self-destruction, and the death of the insured is not within the proviso if he was under the controlling influence of insanity, though he understood the physical nature of his act. In other words no matter how plainly the policy may declare against liability for self-destruction, the courts are bound to cover insanity if any shadow of a rule of law can be found to support the ruling.⁴ The dissent of JJ. Granger and Dickman is much more sensible. They say in effect that if the phrase "die by his own hand" under any circumstances does not include death by his own hand while insane, it is difficult to rely upon the English language to express any idea. When a policy exempts the company from liability in case of self-destruction voluntary or involuntary, and death comes from an overdose of laudanum taken to relieve pain, the proper inquiry is whether the act was a culpable one. The exemption of the company does not depend on the *degree* of negligence of the insured but upon its *culpa*-

¹ *Penfold v. Universal Ins. Co. (N. Y.)*, 10 Ins. L. J. 521.

² 4 *Lans. (N. Y.)* 202.

³ [*Supreme Commandery, &c. v. Ainsworth*, 71 Ala. 436.]

⁴ [*Schultz v. Insurance Co.*, 40 Ohio St. 217.]

bility.¹ It is a question with us how culpability can be a necessary element in "involuntary" self-destruction.] In *Jacobs v. National Life Insurance Company*² the words of exception were "if he shall die by his own hand or act, voluntary or otherwise;" and it was held that the words "or otherwise" were nugatory as of uncertain meaning. Where the policy was to be void "in case of the death of the insured, by his own act and intention, sane or insane," it was held that no recovery could be had if the insured did what he intended, whether he was aware of the moral quality of the act or not. The addition of the words "sane or insane" the court held to be a successful attempt to eliminate from the case the question of the moral responsibility of the insured.³ (a) In Wisconsin the words "sane or insane" were held to have the like effect upon the preceding words, "shall die by suicide, felonious or otherwise."⁴ [So in Michigan, a clause against death by one's own hand, sane or insane, covers all conscious acts resulting in death.⁵ Of course the

¹ [Mutual Life Ins. Co. v. Lawrence, 8 Brad. 488, 491.]

² Sup. Ct. D. C., 5 Big. Life & Acc. Ins. Cas. 42. See also Penfold's Case, *supra*.

³ *Adkins v. Columbia Life Ins. Co.*, 70 Mo. 27, following *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284, and regarding the word "act" in that case as the equivalent of the words "act and intention" in the case under discussion. So held, also, in *Chapman v. Republic Life Ins. Co.* (C. Ct. Ill.), 5 Big. Life & Acc. Ins. Cas. 110, where the words were the same as in *Adkins's* case.

⁴ *Pierce v. Travelers' Ins. Co.*, 34 Wis. 389. See also *Mallory v. Travelers' Ins. Co.* (N. Y.), 2 Ins. L. J. 839. ["Self-destruction, felonious or otherwise," includes all cases of voluntary self-destruction, sane or insane. *Riley v. Hartford Fire, &c. Ins. Co.*, 25 Fed. Rep. 315 (Mo.), 1885, citing 15 Wall. 580; 111 U. S. 612.]

⁵ [Streeter v. Insurance Co., 65 Mich. 199.]

(a) As to the effect of this clause in the policy, see *Rens v. Northwestern Mnt. Relief Ass'n*, 100 Wis. 266; *Tritschler v. Keystone Mut. Ben. Ass'n*, 180 Penn. St. 205; *Spruill v. Northwestern Mut. L. Ins. Co.*, 120 N. C. 141; *Billings v. Accident Ins. Co.* (Vt.), 17 L. R. A. 89, and note; *Sabin v. Senate of the National Union*, 90 Mich. 177; *Salentine v. Mutual Benefit L. Ins. Co.*, 79 Wis. 580; *Home Benefit Ass'n v. Sargent*, 142

U. S. 691. Suicide of the assured, when insane, is not within the condition of a policy avoiding it in case of "death by his own hand." *Manhattan L. Ins. Co. v. Broughton*, 109 U. S. 121; *Accident Ins. Co. v. Crandal*, 120 U. S. 527; *Mnt. L. Ins. Co. v. Leubrie*, 71 Fed. Rep. 843; 42 Cent. L. J. 267, and note; *Kerr v. Minnesota M. Ben. Ass'n*, 39 Minn. 174; 12 Am. St. Rep. 631, and note; *Michigau Mut. L. Ins. Co. v. Nangle*, 130 Ind. 79.

court does not mean to include cases of accidental death.¹ And the United States Supreme Court holds that under a policy which expressly covers only "external, violent and accidental" means of injury, and excludes death by intentional injury inflicted by others or by suicide, felonious or otherwise, sane or insane, no recovery can be had in case of death by self, whether insane or not, nor in case of death caused by injuries intentionally inflicted by others.² In New York the insurers were held to be protected by a clause exempting them from liability if death ensues "from any physical movement of the hand or body of the insured, proceeding from a partial or total eclipse of the mind."³ If the insanity is produced by intemperate habits, which the insured agrees to avoid on penalty of forfeiture of his right to indemnity, it is a complete defence.⁴ [Sometimes it is agreed that in case the insured shall die by his own hand while insane, the company shall only pay back the premiums received, with interest.⁵ A by-law of a mutual company exempting it from liability in case of suicide and passed subsequently to the issue of a certificate to B., cannot affect B.'s rights, no such power being reserved in the contract with B.⁶]

§ 323. **Suicide in a Fit of Insanity does not avoid a Policy unless Death by Suicide be excepted from the Risk; Express Agreement to insure against Voluntary Suicide void as against Public Policy.** — Suicide in a fit of temporary insanity does not avoid a policy which does not contain an express provision that death by such means shall avoid it.⁷ (a) That such

¹ [See § 307. *Seath v. Security Mut. Life Soc.*, 75 Iowa, 346.]

² [*Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 667.]

³ *De Gogorza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 232. To the same effect is *Schmidt v. Home Life Ins. Co.* (Superior Ct. Cincinnati), 8 Ins. L. J. 77, where the language was "suicide, voluntary or involuntary, sane or insane."

⁴ *Jarvis v. Conn. Mut., & Ins. Co.*, C. Ct. (Ill.), 5 Ins. L. J. 507.

⁵ [*Salentine v. Mutual Ben. Life Ins. Co.*, 24 Fed. Rep. 159 (Wis.), 1885.]

⁶ [*Northwestern Ben. & Mut. Aid Ass. v. Wanner*, 24 Brad. 361.]

⁷ *Horn v. The Anglo-Australian & Universal Family Life Ass. Co.*, 7 Jur. N. S. 673. "It appears to me clear," says Wood, V. C., in this case, "that

(a) The term "insanity," used as a deranged condition of the mental and defence, means such a perverted and moral faculties as to render a person

an agreement is void as against public policy was also the opinion of Lord Campbell, as expressed by him in *Moore v. Woolsey*.¹ So the owner of a ship, who insures her for a year, cannot recover upon the policy if, within the year, he causes her to be sunk. And such no doubt would be the case where the plaintiff claims under a policy on the life of a person whose death he has caused;² so, if the insured set fire to his own house.³

Perhaps there may be something in the distinction between a sane and an insane suicide under such a policy. And it has been said, in this country, in a case where the

where there is no express provision in the policy, that in the event of the insured dying by his own hand the policy shall become void, that policy is not vacated by the circumstance of his having died by his own hand while in a state of temporary insanity. It was held by the House of Lords, in *Fauntleroy's case*, *The Amicable Insurance Society v. Bolland*, 2 Dow & C. 1; s. c. 4 Bligh, N. s. 194, that it would be contrary to public policy to insure a man a benefit upon his dying by the hand of public justice; and as it would be contrary to the policy of the law for any such express contract to be made, so no contract could be implied in the policy to pay the amount in such an event; and accordingly, although nothing was said in the policy, one way or the other, the law would infer as a condition that the execution of the insured, in consequence of a crime committed by him, was not one of the cases in respect of which the policy would become payable. So the argument might be pursued, although I do not know that any case has so decided, to the same extent, in the case of a person committing suicide while in a sane state of mind, thus committing a felony, and losing his life thereby; but I know of no rule of law that can justify me in extending that to the case of a person committing suicide while in a state of insanity, and therefore committing no legal offence."

¹ 4 E. & B. 243; s. c. 28 Eng. L. & Eq. 248.

² *Reed v. Royal Exch. Ass. Co.*, Peake's Add. Cas. 70.

³ *Washington Ins. Co. v. Wilson*, 7 Wis. 169.

incapable of distinguishing between right and wrong, or unconscious, at the time, of the nature of the act he is committing; or where, though conscious of it and able to distinguish between right and wrong, and knowing that the act is wrong, yet his will, by which is meant the governing power of the mind, has been otherwise than voluntarily so completely destroyed or mystified that his actions are not subject to it, but are beyond his control. *Davis v. United States*, 165 U. S. 373, 378; *Ritter v. Mutual L. Ins. Co.*, 169 U. S. 139, 149;

Mutual L. Ins. Co. v. Wiswell (56 Kansas, 765), 35 L. R. A. 258, and note. Suicide, though evidence of insanity, does not establish it as a fact, and the presumption of sanity places the burden of proof upon the party alleging insanity. *Ingersoll v. Knights of the Golden Rule*, 47 Fed. Rep. 272; *Ritter v. Mutual Life Ins. Co.*, 69 id. 505; 169 U. S. 139; *Jones v. Gorham*, 90 Ky. 622; *Bachmeyer v. Mutual Reserve Fund L. Ass'n*, 82 Wis. 255; *Agan v. Met'n L. Ins. Co.* (104 Wis.), 80 N. W. 1020.

suicide was by taking arsenic, and no question of insanity was raised, that a man who commits suicide is guilty of such a fraud upon the insurers, that for that reason alone he cannot recover, even though there be no such condition in the policy.¹ But the case did not require the decision of this point. And in *Dormay v. Borradaile*,² the question being upon a covenant in a marriage settlement to keep a policy alive, and whether suicide was a violation of that covenant, it was held that it was not. The covenant was "to do and perform all such acts, matters, and things as shall be requisite for continuing and keeping on foot a policy," and it was held not the equivalent of a covenant not to do anything whereby the policy should become forfeited; and a suicide (the same as in *Borradaile v. Hunter*) who drowned himself, voluntarily and intending it, though found by the jury not to be at the time capable of distinguishing between right and wrong, was held not to have violated his covenant.

§ 324. **Bona fide Holder for Value; Beneficiary.** — To a life policy which provided that if the party die by his own hands the policy should be void except to the extent of any *bona fide* interest which a third person might have acquired, it was objected that the exception was an incentive to suicide, and that the policy was void as against the policy of the law. But the court thought that, though a stipulation that the policy should be paid in case of suicide of the insured would be obnoxious to that objection, yet a stipulation that if the policy should be assigned *bona fide*, for a valuable consideration, or a lien upon it should afterwards be acquired *bona fide*, for valuable consideration, it might be enforced for the benefit of others, whatever be the means by which death is occasioned, was not open to the objection. That such stipulation may promote evil by leading to suicide is too remote and improbable a contingency to be allowed to counterbalance the many obvious advantages which would

¹ *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466; *Bank of Oil City v. Guardian, &c. Ins. Co.*, C. C. P. (Pa.), 5 Big. Life & Acc. Ins. Cas. 478.

² 10 Beav. 335.

result from holding the stipulation valid.¹ But an assignee in bankruptcy is not such a *bona fide* holder for valuable consideration. He is an assignee by operation of law and not by contract.² So where there is a condition in a life policy that in the event of the assured dying by his own hand the policy shall be void, except to the extent of any *bona fide* interest, which, at the time of his death, shall be vested in any other person or persons for his or their own benefit, the exception applies as much when that interest is vested in the assurers themselves as when it is vested in a third party.

Therefore, where one effected a policy of insurance upon his life, with the above condition and exception, and deposited the same with the insurers by way of collateral security for a loan from them to him, it was held that, notwithstanding the suicide of the insured, the policy was good to the extent of the debt for which it was held as security, and therefore that the debt was extinguished by the moneys which became payable under the policy.³ So, in the absence of express stipulation to the contrary, suicide by the life insured will not avoid a policy issued on that life for the benefit of his wife and children.⁴ (a)

¹ Per Lord Campbell, *Moore v. Woolsey*, 28 Eng. L. & Eq. 248; s. c. 4 E. & B. 243; *White v. British Empire Mut. Life Ass. Co.*, 7 Law Rep. Eq. 394.

² *Jackson v. Forster*, 1 El. & El. 463 (Q. B.); affirmed in Exch., id. 476.

³ 38 L. J. N. S. Ch. 53; *The Solicitors' & General Life Ass. Co. v. Lamb*, 1 Hem. & M. 716; affirmed on appeal, 2 De Gex, J. & S. 251; s. c. 33 Law J. Rep. N. S. Ch. 426; *Dufaur v. The Professional Life Ass. Co.*, 25 Beav. 599; s. c. 27 Law J. Rep. N. S. Ch. 817; *Jones v. The Consolidated Investment & Ass. Co.*, 26 Beav. 256; s. c. 28 Law J. Rep. N. S. Ch. 66.

⁴ *Fitch v. Am. Popular, &c. Ins. Co.*, 59 N. Y. 557. [If there is nothing in the policy nor the constitution and by-law to prevent, the heirs or beneficiary of a member of a mutual benefit association may recover, although he committed suicide. *Mills v. Rebstock*, 29 Minn. 380; *Kerr v. Minneapolis Mut. Ben. Ass.* 39 Minn. 174.]

(a) In *Ritter v. Mutual L. Ins. Co.*, 169 U. S. 139; 70 Fed. Rep. 954, it was held that there can be no recovery on a life policy by the *executor* of one who, while sane, intentionally took his own life, even though the policy contains no clause of forfeiture because of such act. Under a policy which contains no suicide clause, the suicide of an insane person is insured against. *Grand Lodge v. Wieting*, 163 Ill. 408, 418. In *Seiler v. Economic L. Ass'n*, 105 Iowa, 87, it was held that such a policy, if taken out in good faith, is not avoided, as

§ 325. **Evidence ; Suicide ; Insanity ; Negligence ; Accident.**
 — When the dead body of the insured is found under such circumstances and with such injuries that the death may have resulted from negligence, accident, or suicide, the presumption is against suicide, as contrary to the general conduct of mankind, a gross moral turpitude not to be presumed in a sane man;¹ and whether it was from one or the other, if there is any evidence bearing upon the point, is for the jury; as for instance, whether the taking of an overdose of laudanum was intentional or by mistake. If the latter, it was accidental and not suicidal.² Where the question arises whether the death is by suicide, evidence that the deceased was an infidel or an atheist or a spiritualist, is inadmissible as affording an inference of greater probability of suicide. The inference of one fact from the proof of the existence of another depends upon the observed connection of the two in the relation of antecedent and consequent, — a relation which, so far as the two facts in question are concerned, is so entirely unsupported by experience and observation as to belong rather to the domain of conjecture than of proof.³ [The burden of proof is upon the company setting up suicide

¹ *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52; *Same v. Same* (N. Y.), 2 Ins. L. J. 839. [*Contra*. There is no legal presumption that the insured did not kill himself. *Mutual Ben. Life Ins. Co. v. Daviess' Ex'x*, 87 Ky. 541.]

² *Pierce v. Travelers' Ins. Co.*, 34 Wis. 389; *ante*, § 321; *Lawrence v. Mutual Life Ins. Co.* (App. Ct. of Ill.), 9 Ins. L. J. 313; *Shank v. United Brethren, &c. Soc.*, 84 Pa. St. 385; *Newton v. Mutual Benefit, &c. Ins. Co.*, 2 Dill. C. Ct. 154.

³ *Gibson v. American Mut. Life Ins. Co.*, 37 N. Y. (10 Tiff.) 580; *Continental, &c. Ins. Co. v. Delpuech*, 82 Pa. St. 225.

against the *beneficiary* named therein, because the insured, while sane, purposely took his own life. But see *Hopkins v. Northwestern L. Ass. Co.*, 94 Fed. Rep. 729. If not taken out in good faith, fraud through suicide for the benefit of friends or creditors is a good defence. See *Smith v. National Benefit Society*, 123 N. Y. 85. The exception in a policy of "death by suicide, whether felonious or otherwise," includes death by poison taken accidentally, by mistake for medicine. *Cole v. Accident Ins. Co.*, 61 L. T. 227. But a

stipulation against death by "taking poison" does not apply to an accidental taking thereof. *Menneiley v. Employers' L. As. Corp.*, 148 N. Y. 596; *Early v. Standard L. Ins. Co.*, 113 Mich. 58; *Travelers' Ins. Co. v. Dunlap*, 160 Ill. 642; *Met'n Ac. Ass'n v. Froiland*, 161 Ill. 30; *Miller v. Fidelity & Cas. Co.*, 97 Fed. Rep. 836. So of the accidental "inhaling of gas." *Menneiley v. Employers' L. As. Corp.*, *supra*; *Pickett v. Pacific M. L. Ins. Co.*, 144 Penn. St. 79; *Fidelity & Cas. Co. v. Waterman*, 161 Ill. 632.

as a defence.¹] And the burden is upon the party alleging insanity to prove it.² (a) There is no presumption of law, *prima facie* or otherwise, that self-destruction arises from

¹ [Goldschmidt v. Mut. Life Ins. Co., 102 N. Y. 486.]

² Terry v. Life Ins. Co., *ante*, §§ 319, 320.

(a) The insurer has the burden of proof upon the issue of suicide as a defence, the presumption being against suicide. *Knights of Pythias v. Beck*, 94 Fed. Rep. 751; *Standard L. & Acc. Ins. Co. v. Thornton*, 100 id. 582; *Walcott v. Met'n Ins. Co.*, 64 Vt. 221; *Carnes v. Iowa State T. M. Ass'n*, 106 Iowa, 281; *Dennis v. Union Mut. L. Ins. Co.*, 84 Cal. 570; *Ins. Co. v. Bennett*, 90 Tenn. 256; *Supreme Council v. Brashears*, 89 Md. 624; *Fidelity Mut. L. Ass'n v. Miller*, 92 Fed. Rep. 63; *Merrett v. Preferred Masonic Mut. Acc. Ass'n*, 98 Mich. 338; *Leman v. Manhattan L. Ins. Co.*, 46 La. Ann. 1189; *Hale v. Life Ind. Co.*, 61 Minn. 516; *Travellers' Ins. Co. v. Nitterhouse*, 11 Ind. App. 155; *Agen v. Met'n L. Ins. Co. (Wis.)*, 29 Ins. L. J. 37; see *Fidelity & Cas. Co. v. Weise (Ill.)*, id. 74; *Home Benefit Ass'n v. Sargent*, 142 U. S. 691; *Conadeau v. American Acc. Co.*, 95 Ky. 280. The same presumption applies to murder as a defence in the law of accident insurance. See *Ins. Co. v. Bennett*, 90 Tenn. 256; *Warner v. U. S. Mut. Acc. Ass'n*, 8 Utah, 431. As to the right of an assignee for value to recover in case of suicide, see *City Bank v. Sovereign L. A. Co.*, 32 W. R. 658; 50 L. T. 565. As to the evidence that is admissible and sufficient to overcome such presumptions, see above cases; *Travelers' Ins. Co. v. Melick*, 65 Fed. Rep. 178; *Conn. Mut. L. Ins. Co. v. McWhirter*, 73 id. 444; *Sharland v. Washington L. Ins. Co.*, 101 id. 206; *Home Benefit Ass'n v. Sargent*, 142 U. S. 691; *Mutual L. Ins. Co. v. Tillman*, 84 Texas, 31; *Mutual L. Ins. Co. v. Hayward (Tex. Civ. App.)*, 23 Ins. L. J. 694; *Williams v. U. S. Mut. Acc. Ass'n*, 133 N. Y. 366. It is a question of law for the court to decide whether the evi-

dence shows a reasonable probability of suicide, and, if such probability exists, then it is for the jury to decide upon the conflicting evidence. *Agen v. Met'n L. Ins. Co.*, 29 Ins. L. J. 37; *Rens v. Northwestern Mut. Ben. Ass'n*, 100 Wis. 266. Death from accident, or from "external violence and accidental means," is presumed when the evidence as to suicide or murder is conflicting and about evenly balanced, and positive proof of the cause of death is not required by the policy. *Ingersoll v. Knights of the Golden Rule*, 47 Fed. Rep. 272; *Burnham v. Interstate Cas. Co.*, 117 Mich. 142; *Konrad v. Union Cas. Co.*, 49 La. Ann. 636; *Ins. Co. v. Bennett*, 90 Tenn. 256; see to the effect that the claimant has the burden of proof upon an accident policy, *Fidelity & Cas. Co. v. Weise (Ill.)*, 29 Ins. L. J. 74; *Carnes v. Iowa State T. M. Ass'n*, 106 Iowa, 281; *Brown v. Sun L. Ins. Co. (Tenn.)*, 57 S. W. 415. As to the effect of suicide after an assault that must speedily result in death, see *People v. Lewis*, 124 Cal. 551; 34 Am. L. Rev. 442. If the assured takes his own life when he is mentally incapable of comprehending his act morally, though fully understanding its physical nature, the insurer may still be liable, though the policy exempt it from suicide resulting directly from involuntary disease or accident. *Manhattan L. Ins. Co. v. Broughton*, 109 U. S. 121; *Conn. Mut. L. Ins. Co. v. Akens*, 150 U. S. 468; *Ritter v. New York Mut. L. Ins. Co.*, 69 Fed. Rep. 505; 169 U. S. 139; see *Accident Ins. Co. v. Crandal*, 120 U. S. 527; *Johns v. Northwestern Mut. Relief Ass'n*, 90 Wis. 332; *Cotter v. Royal Neighbors (Minn.)*, 79 N. W. 542; *Burnham v. Interstate Casualty Co.*, 117 Mich. 142; *Cochran v. Mutual L. Ins. Co.*, 79 Fed. Rep. 46. As

suicide; but suicide threatened or attempted, or actually committed, is competent evidence upon that issue.¹ The opinion of unprofessional witnesses as to whether a person under a given state of facts, if sane, would have taken his own life, is not competent evidence.² Nor is evidence of a current rumor to show the probable motive of an act, as of suicide, admissible, unless it be shown that the rumor was known to the party before he committed the act.³ [When the question was whether the assured, X., died by his own hand, the declaration of A., since dead, that on the night of the assured's death, he saw a man, B., come from X.'s room saying "something about a man having shot himself," that A. then went into the room and found that X. was dead, and that no one else was around at the time, was admitted as a part of the *res gestæ*, both A. and B. being dead.⁴ A letter left by the suicide requesting that the revolver with which he was going to shoot himself be preserved for a keepsake for his darling boy, and telling of a voice he thought his mother's calling him to die, is evidence for the jury of an insane impulse.⁵ The finding of the coroner's jury is *prima facie* evidence of the manner and cause of

¹ Mutual Life Ins. Co. v. Terry, *ante*, § 319; Wolff v. Connecticut, &c. Ins. Co., C. Ct. (Mich.), 8 Ins. L. J. 97; Coverston v. Connecticut, &c. Ins. Co., C. Ct. (Mo.), 1 Am. L. T. Rep. n. s. 239; s. c. 4 Big. Life & Acc. Ins. Cas. 169; Moore v. Connecticut, &c. Ins. Co., C. Ct. (Mich.), 1 Am. L. T. Rep. 319; s. c. 4 Big. Life & Acc. Ins. Cas. 139; McClure v. Mut. Life Ins. Co., 55 N. Y. 651; Coffey v. Home, &c. Ins. Co., 44 How. Pr. (N. Y.) 481; Mallory v. Travelers' Ins. Co., 47 N. Y. 52; Bank of Oil City v. Guardian, &c. Ins. Co., C. Ct. (Pa.), 4 Ins. L. J. 473; Hartman v. Connecticut, &c. Ins. Co. (Ohio), 4 Ins. L. J. 159; Weed v. Mutual Benefit Life Ins. Co., 35 Superior Ct. (N. Y.), 386; Hiatt v. Mutual Life Ins. Co., 2 Dill. C. Ct. 572; Isett v. American Life Ins. Co., *ante*, § 317. As to evidence of Insanity, see also Higbie v. Guardian Mut. Life Ins. Co., 53 N. Y. 603.

² St. Louis Mut. Life Ins. Co. v. Graves, 6 Bush (Ky.), 268.

³ *Ibid.* See also *post*, § 584.

⁴ [Newton v. Ins. Co., 2 Dill. 154, 155.]

⁵ [Meacham v. N. Y. State Mut. Benefit Ass., 44 Hun, 365.]

to statutory provisions reducing the amount to be paid in case of suicide, see Keller v. Travelers' Ins. Co., 58 Mo. App. 557. As to subsequent regulation by the insurer or by a benevolent society, see Supreme Lodge v. La Malta, 95 Tenn. 157; Jarman v. Knights Templars' L. Ind. Co., 95 Fed. Rep. 70; Knights of Pythias v. Stein, 75 Miss. 107.

death.¹ Proofs of death including the coroner's inquest and verdict of the coroner's jury are not admissible except for the purpose of showing performance of the conditions in regard to preliminary proofs. Neither can the testimony of the wife at the inquest be introduced to contradict her evidence in a suit against the company by her, as administratrix, she being called to the stand by the company.² In this case the wife testified clearly before the coroner that her husband shot himself, but in the suit against the company denied the facts, and denied that she so testified before the coroner. An allegation that the insured "did immorally, wrongfully and wickedly" commit suicide is equivalent to an allegation of self-destruction while sane.³

¹ [Walther v. Mutual Life Ins. Co., 65 Cal. 417.]

² [United States Life Ins. Co. v. Kielgast, 26 Brad. 567, 571-572.]

³ [Northwestern Benevolent & Mut. Aid Ass. v. Bloom, 21 Brad. 159.]

CHAPTER XVI.

OF DEATH BY LAW, OR WHILE VIOLATING IT, BY VIOLENCE, CASUALTY, OR WAR; AND OF RESTRICTIONS UPON RESIDENCE AND TRAVEL.

ANALYSIS.

- § 326. "Death by the hands of justice" is excepted, impliedly, whether there is any express provision or not, and indeed could not be covered even if expressly agreed upon.
- § 327. Death in the known violation of law. If two men quarrel, and A. flees, is followed, and slain by B., under circumstances that would have justified A. in killing B. in self-defence, A. does not die in the known violation of law, § 327; see § 327 A. presumption as to foreign law, § 331.
- § 327 A. One retreating from assault or robbery. Suicide as a crime. Suicide to avoid arrest for a prior crime is not death in consequence of a violation of law.
- § 328. One shot in the act of unhitching his debtor's horses in order to take them as redress for his debt is within the exception.
- § 329. In Massachusetts the act must be a criminal one.
 in New York the tendency is to hold any unlawful act that might lead to conflict or otherwise tend to endanger life is within the intent, whether prohibited by the criminal code or not. So in Indiana; see § 327 A.
 if the violation of law has no causative relation to the death it is immaterial, as, where a man is killed by accident while swearing, § 329.
- § 330. Death by violence is covered by policy unless expressly excepted.
- § 332. War. Death by casualty or in consequence of war. Permit.
- §§ 333-334. What constitutes entering military service.
- §§ 335-339. Restrictions upon residence and travel.
 license, 335, 338.
 "settled limits," § 337.
 waiver by company or by agent receiving premiums with knowledge of breach, § 339.

§ 326. **Death by the Hands of Justice.** — Usually associated with the exception of liability for death by suicide is that of "death by the hands of justice." This is defined by Tindal, C. J., as dying in "consequence of a felony previously committed."¹ It is death under and by virtue of a

¹ *Borradaile v. Hunter*, 5 M. & G. 639.

judicial sentence for some crime, and not merely a rightful killing, as in case of a runaway slave shot by a patrolman who was attempting to apprehend him, as it was his legal right and duty to do.¹ Death under such circumstances is not "by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped authority, or by the hands of justice."²

An exception of liability in case of "death by the hands of justice" has been held to be unnecessary, as it is against public policy to insure against the consequences of a capital felony; and such a risk could not be covered by the policy even if expressly agreed upon. As the law will not permit an express stipulation that a man shall derive pecuniary benefit upon his dying by the hands of public justice, as against public policy, it will not imply any such stipulation. Death, therefore, at the hands of public justice works a forfeiture of all right to indemnity under a policy, whether it does or does not contain such stipulation.³

§ 327. **Death in known Violation of Law.** — Another exception from liability is that of "death in the known violation of law;" and what constitutes "death in the known violation of law" has been the subject of considerable discussion; but it cannot be said that the law is settled upon this point. In *Harper v. Phoenix Insurance Company*,⁴ the question arose whether killing in self-defence was within the proviso; but as the facts found and reported did not fully present this case, it was sent back for a new trial, when the facts were agreed; and these, with the opinion of the court thereon, are stated in the note.⁵

¹ *Spruill v. North Carolina Mut. Life Ins. Co.*, 1 Jones (N. C.) Law, 126.

² *Ibid.*

³ *The Amicable Ins. Soc. v. Bolland*, 2 Dow & C. 1; s. c. 4 Bligh, n. s. 194, overruling s. c. *Bolland v. Disney*, 3 Russ. 350.

⁴ 18 Mo. 109.

⁵ "On the 6th day of February, 1850, and in the year within the time for which the life of said Edmund Harper was insured, one Coryell was talking to a man named Wilson, standing about forty paces from B. Harper's store, where the said Edmund Harper, the deceased, then was. The deceased spoke to the said Wilson, and asked him if he knew to whom he was speaking, and admonished him to keep his hand on his pocket. Coryell then approached the deceased, and

[§ 327 A. Where the insured and another attacked B., who drew a pistol, and while the insured was retreating B.'s

inquired if that insult was intended for him. The deceased replied that it was. The parties quarrelled, the deceased drew a pistol with a single barrel and snapped it at Coryell, who thereupon drew a revolver and advanced upon the deceased, standing on the sill of B. Harper's store door, who threw his pistol, which had missed fire, and struck Coryell. The deceased then stepped into the store of B. Harper, and said Coryell, standing in the door of said store, with his revolver shot at and missed said deceased, who was inside the store, and eight or ten feet from the door. The deceased then retreated precipitately behind an offset formed by a stairway, six or eight feet, and picked up a stick of wood, and raised it in a threatening position over his head, but did not advance upon said Coryell, nor attempt to use said stick in any other manner. Coryell then fired again with his revolver, and shot the deceased through his body, of which he died in a few minutes. The whole difficulty was one continuous quarrel.

"Upon these facts the court found for the defendant, whereupon the plaintiff sued out this writ of error: 1. In the construction of the contract which has given rise to this controversy, we are not authorized to be influenced by any considerations affecting the preservation of the peace and order of society, or of the morals of the party insured. Whilst the law will not countenance contracts against its policy, it does not look for a support to itself in the stipulations of men. In life policies the insurer has a guaranty against increasing the risk insured, by that love of life which nature has implanted in every creature. In such policies, unless it is otherwise stipulated, the insurer takes the subject insured with his flesh, blood, and passions. The dangers to which the lives of men are exposed from sudden ebullitions of feeling are a lawful matter of insurance. When this cause was formerly here, the idea intended to be conveyed in the opinion given was that a person could not be said to have died in the known violation of a law of this State, when a crime attached to the individual by whom he was slain. It was not supposed that therefore it followed that in all cases when the killing was without crime, that the person slain died in the known violation of the law. We see no reason to change the opinion then hazarded. Although conditions in policies, similar to that now under consideration, are not unusual, we have not been enabled to find any case in which its interpretation has come up for adjudication. We must then, as in all other cases involving the construction of contracts, look to the intent of the parties, as gathered from the instrument embodying their minds. It is obvious that, in giving the words of the condition a literal meaning, cases will be embraced which no one will maintain were in the contemplation of the parties. If the person whose life is insured uses offensive language to one whilst they are engaged in an unlawful game of chance, which language is concerning the game, and he is shot down for the provocation, it would not be maintained that he died in the known violation of a law of the land, within the meaning of the contract. So if he is riding a race in a public highway, which is forbidden, and his horse falls, and he is thrown and his neck broken, he does not die in the known violation of the law of the land, within the meaning of the terms of the condition. So, also, in a quarrel, if he assails another with his open hand, and is thereupon instantly shot down, he does not die in the known violation of a law within the intent of the policy. Many similar instances might be put, which, it is clear, were not within the meaning of the parties, and, if they were, the contract would be much narrowed

pistol, by intention or by accident in the struggle with the other assaulter, went off, and killed the insured, it was held

in its operation. If, then, the literal sense of the words of the policy leads to conclusions which are inadmissible, we are necessarily driven to some other mode in order to ascertain the meaning of the parties. In the interpretation of contracts of insurance, the maxim *noscitur a sociis* obtains. When a clause stands with others, its sense may be gathered from those which immediately precede and follow it. The clause in the policy which immediately goes before that under consideration is, 'If the party shall die by the hands of justice.' Now, do not these words clearly indicate the idea in the minds of the parties at the time? Do they not show that it was a justifiable killing? There are other modes of killing justifiable besides execution by the law. Dying by the hands of justice means dying by the execution of the sentence of law. The fourth section of the second article of the act concerning crimes and punishments enumerates many instances of justifiable homicide. These are, in resisting any attempt to murder or to commit any felony on the person or in a dwelling-house; in a lawful defence of the person, where there is reasonable cause to apprehend a design to commit a felony; when necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot or insurrection, or in lawfully keeping or preserving the peace. Here are abundant instances in which the words of the condition can have play, without resorting to a latitude of construction which so extends its sense as to embrace cases which were never in the contemplation of the parties. As there was but one mode of justifiable killing expressed, it was necessary to use general words to include all other modes of such killing, as they were equally within the meaning of the contract. The other clause in the condition is that if the party shall die in consequence of a duel. If a man falls in a duel, his slayer is guilty of murder. A duel is a deliberate act, and the parties voluntarily, in violation of law, expose themselves to death. The kindred clauses of the condition thus show that a dying in consequence of a felony in the very act or course of being committed by the insured, and a dying in consequence of a felony previously committed by him, were in the contemplation of the parties. Now it would seem that, upon the acknowledged rule of construction, *noscitur a sociis*, the last clause in the condition, being left in doubt as to its meaning, should be construed only to extend to instances in which the party died in the commission of a felony. It has been shown that a literal interpretation of this clause would embrace cases not within the intention of the parties. Now the words of the condition are the words not of the assured, but of the insurers, introduced by themselves for the purpose of their own exemption and protection from liability; both in reason and justice, therefore, no less than upon acknowledged principles of legal construction, they are to be taken most strongly against those that speak the words, and most favorably for the other party; for it is no more than justice that if the words are ambiguous, he whose meaning they are intended to express, and not the other party, should suffer by the ambiguity. 5 M. & G. 639. See note *sub fin.* The facts of this case clearly show that the person slaying Harper was guilty of a crime. There is no proof of the fact set up as a bar that Coryell slew Harper in self-defence. Harper had abandoned the conflict, retreated as far as possible, and endeavored to screen himself from the attack of his assailant. His having a stick of wood in his hand at the time he was slain did not, in the least, extenuate the guilt of Coryell. Under the circum-

that the death was the result of a violation of law by the insured, and the policy was void.¹ But where G., a conspirator to rob the State treasury, on coming out of the door with the money was shot down by the watchman (unnecessarily, since he could easily have been captured without firing, in all probability), it was held that he did not die while violating the law in such sense as to avoid the policy, the judge comparing the case to one where a man makes an assault in a building, and on coming out of it is attacked and killed.² We do not think the decision or the attempted parallel correct. He had not ceased to violate the law in the case at bar, as in the case supposed. Every step with the State's money away from the bank was a part of the action necessary to complete his crime, get the booty into his safe custody, and deprive the State of it. Every such step was a violation of law. It was *in consequence of his violation* of law and *during* it that he was killed, and a recovery was absurd. And it is of no consequence whether the death resulted from the violation of criminal law, or of a rule of civil law, if the breach was such as increased the risk and led naturally to death or to injuries causing it. One who violently assaults the wife of another must know that he endangers his life through the probable action of her husband.³ In New York under the code successful suicide is not a crime, and does not avoid a policy under the clause

stances Harper would have been justified had he slain Coryell. This is made so by our statute. He would have been excused by the common law. If A. upon a sudden quarrel assaults B. first, and upon B.'s returning the assault A. really and *bona fide* flees, and, being driven to the wall, turns again upon B. and kills him, this is *se defendendo*. 1 Hale, 480; Foster, 273. By the twelfth section of the second article of the act concerning crimes and punishments, it is enacted that every person who shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony or do any other unlawful act, after such attempt shall have failed, shall be deemed guilty of manslaughter in the second degree. Now if one dies under circumstances which would justify him in slaying his adversary, and when the person causing his death is thereby guilty of a felony, is it not a gross perversion of language to say that the person died in the known violation of a law of the land?" *Overton v. St. Louis, &c. Ins. Co.*, 39 Mo. 122.

¹ [Murray v. New York Life Ins. Co., 30 Hun, 428; 96 N. Y. 614.]

² [Griffin v. Western Mut. Ass., 20 Neb. 620.]

³ [Bloom v. Franklin Life Ins. Co., 97 Ind. 478.]

against liability in case of death "in violation of, or attempt to violate, any criminal law."¹(a) But an *unsuccessful attempt* to commit suicide is criminal.² Suicide to avoid arrest and trial for a crime committed is not death "in consequence of a violation of law." The crime is not the proximate cause of death, and the suicide itself is not a crime within the meaning of the clause.³ In Massachusetts an attempt to commit suicide is not indictable.⁴

§ 328. In a case in Massachusetts,⁵ in which it appeared

¹ [Darrow v. Family Fund Soc., 42 Hun, 245; Freeman v. National Benefit Soc., 42 Hun, 252, and next note.]

² [Id. and Darrow v. Family Fund Soc., 116 N. Y. 537. New York believes in success in all undertakings, and discourages failure.]

³ [Kerr v. Minneapolis Mut. Ben. Ass., 39 Minn. 174.]

⁴ [Commonwealth v. Dennis, 105 Mass. 162.]

⁵ Cluff v. Mut. Ben. Life Ins. Co., 13 Allen (Mass.), 308. The same case was again before the court, reported *ut supra*, when, by Foster, J., it took occasion to state its views more at large: "In the opinion of the court, the condition that the policy should be null and void, among other grounds, in case the insured should die 'by the hands of justice, or in the known violation of any law' of the State or country where he resided, or which he was permitted to visit, must be construed to refer to a voluntary criminal act on the part of the insured, known by him at the time to be a crime against the law of such State or country. Applying the maxim *noscitur a sociis*, and remembering that such a clause ought not to be so interpreted as to work a forfeiture unless that intention is apparent, as well as from the natural import of the words 'known violation of law,' we conclude that they do not extend to mere trespasses against property or other infringements of civil laws to which no criminal consequences are attached. The forcible taking of the horses from Cox, if done under an honest claim of right, however ill-founded, would not constitute the crime of robbery or larceny; because where a party sincerely, although erroneously, believes that he is legally justified in taking property, he is not guilty of the felonious intent which is an essential ingre-

(a) This is also the rule in Wisconsin, although suicide is there treated as technically a crime at common law, under a policy excluding death in violation of law, containing no suicide clause, and making the policy incontestable, except for non-payment of premiums or misrepresentation of age. Patterson v. Natural Premium M. L. Ins. Co., 100 Wis. 118, 126. As to such incontestable clause, see Clement v. New York L. Ins. Co. (Tenn.), 42 L. R. A. 247, note; Mass. Benefit L. Ass'n v. Robinson, 104 Ga. 256; Simpson v. Va. L. Ins. Co., 115 N. C. 393; Mareck v. Mutual Re-

serve Fund L. Ass'n, 62 Minn. 39. In Missouri, suicide is by statute not a defence unless contemplated by the assured in applying for the policy. See Knights Templar Ind. Co. v. Berry, 50 Fed. Rep. 511; Etna L. Ins. Co. v. Florida, 69 id. 932; Ticktin v. Fidelity & Cas. Co., 87 id. 543; Christian v. Conn. Mut. L. Ins. Co., 143 Mo. 460; Jarman v. Knights Templars' L. Ind. Co., 95 Fed. Rep. 70; Haynie v. Knights Templars' L. Ind. Co., 139 Mo. 416; McDonald v. Bankers' L. Ass'n (Mo.), 55 S. W. 999.

that the insured was killed in an altercation, brought on by an attempt on his part to unhitch a pair of horses attached

client of these crimes. Neither does the taking of horses from a vehicle to which they are harnessed amount to an assault upon the driver, unless accompanied by violence or threats of violence against him. An assault is an intentional attempt by force to injure the person of another. *Commonwealth v. Ordway*, 12 Cush. 270. A battery is committed whenever the menaced violence of an assault is done in the least degree to the person. Either an assault or battery would be a crime within the condition of the policy, unless justified as a measure of necessary self-defence. Assuming that Cluff did commit a criminal assault, it may not necessarily follow that he died in the known violation of law. If he was shot while the assault continued, such would be the case. But if it had ceased and Cluff was not threatening to renew it, and Cox had withdrawn out of his reach and then shot him, not in the course of the affray, but merely to revenge himself for what had been done, or to prevent the seizure of the horses, then at the time he was killed Cluff was not engaged in a known violation of the law, within the meaning of the policy. For he must have received the mortal wound during and while engaged in the commission of a crime, not merely in consequence of it afterwards. But the jury, upon all the evidence, should consider whether, if he is proved to their satisfaction to have been once engaged in a criminal assault, he can be deemed to have desisted from it, while persisting continuously in the very act in the course of which the affray occurred. Their attention should be called distinctly to the question whether, if Cluff had committed a criminal assault, it was so far ended when he was fired upon that the fatal shot is to be regarded as a new and independent event, rather than a mere continuation of the original affray. If Cluff committed a criminal assault on Cox, which the latter immediately returned by a fatal blow, then the death would have been occasioned in a known violation of law, although the jury might believe that Cluff was not at the moment intending to commit any further assault. The question to be considered is, were the two acts — the assault by Cluff and the firing of the pistol by Cox — a part of one conflict for the possession of the horses, or had Cox abandoned his attempt to regain the custody of the horses, and had Cluff desisted from his assault? Was the fight over, or had Cox merely retired to a more advantageous position? In short, if Cluff in the first instance did commit a criminal assault, and the firing of the pistol was a part of the same continuous transaction, then the condition of the policy was violated. It must also appear that the death was caused or occasioned by, or resulted from, the criminal act. The loss of life must be connected with the crime as its consequence. By reason of the guilty act the death must have occurred, so that without its commission it would not have taken place. In the opinion of a majority of the court it is not, however, essential that the deceased should have known, or have had reason to believe, that his criminal act would or might expose his life to danger. The fact that the crime actually did produce the death is sufficient to avoid the policy, without regard to the probability that such a result would ensue." To this extent the ruling of the court, when it first came before them, and not then requiring any more explicit ruling upon this point, was modified in the second consideration of the case. On exceptions after a third trial, it was held that the honest belief in the right to do the act, while doing which the insured was shot, must be a belief in his legal right to do the acts, and not a mere belief in the right of self-redress on account of the disturbed condition of the country, the inefficient administration of the laws, or otherwise. 99 Mass. 317.

to the wagon of another, who, the insured alleged, owed him a bill, and while the insured was proceeding to take possession of the horses, as a means of enforcing the payment of the bill alleged to be due him, when he was shot by the driver of the horses, the court held, on a question as to whether there was evidence for a jury, that if the insured when he was shot was engaged in a criminal violation of law (of which there was evidence to go to a jury), known by him to be so, and if such violation of law might have been reasonably expected to expose him to violence which might endanger life, the case was within the exception.

§ 329. In *Bradley v. Mutual Benefit Life Insurance Company*,¹ which was an action upon substantially the same form of policy, and upon the same life, the views of the court were substantially in accordance with those of the Supreme Court of Massachusetts, except upon the point that the violation of law must be a criminal act. Upon this point the Supreme Court held that any act in violation of law which would naturally lead to a conflict by which the life of the insured would be endangered would come within the exception. But the case was sent back on another point, and the question is still an open one in New York.² The majority of the Court of Appeals seem to have been inclined to take the same view of the import of the proviso as had already been taken by the Supreme Courts of Massachusetts and Missouri; while the minority held that the proviso embraced the violation of any law when the violation was of such a character as to tend directly to endanger life.³

¹ 3 Lans. (N. Y.) 341; s. c. in the Court of Appeals, 45 N. Y. (6 Hand.) 422.

² The proviso excepted liability from death "in case the insured shall die by his own hand, or in consequence of a duel, or by reason of intemperance from the use of intoxicating liquors, or by the hands of justice, or in the known violation of law of these States or of the United States."

³ The argument in favor of this view is well stated by Mr. Justice Grover in his dissenting opinion, who, after stating the doctrine as held by the Massachusetts Supreme Court, thus proceeds: "This was so held . . . upon an application of the maxim *noscitur a sociis*. How this maxim can apply to the present case, or, if applied, how the conclusion deduced by the court therefrom follows, I am unable to perceive. Among the associates is that of the death happening by reason of intemperance from the use of intoxicating liquors. It is obvious that, if the death happened from this cause, the case would come within the proviso

In a still later case, where it appeared that the insured came to her death by reason of a miscarriage, produced by an illegal operation performed upon her, and voluntarily

whether such use of intoxicating liquors was prohibited by the criminal law of the State where it occurred or not; applying the maxim to this, it might with equal propriety be argued that it was not the criminal law that was had in view by the parties, as that it was such law, because death by the hands of justice is also included by the same proviso. To arrive at the intention of the parties to the contract we must consider the subject-matter in reference to which the language was used. What was the risk to be incurred by the defendant in insuring the life of Cluff? From the policy it appears that the defendant was willing to assume all the general risks to be incurred by such insurance to the extent of the amount insured. From the proviso it appears that the defendant was unwilling to incur, and therefore refused to assume, the additional risks to his life incurred while the assured was engaged in the prohibited acts specified in the proviso, and therefore carefully provided that it should not be liable in case of death while engaged in the prohibited acts. Keeping these considerations in view, there will be but little difficulty in arriving at the intention of the parties, and, consequently, at the correct construction of the proviso. It is obvious that the violation of law in which the insured is engaged, whether such law be criminal or civil, must have some connection with the death, as cause and effect, — not necessarily the immediate cause, as it is sufficient if it puts in operation that cause. To illustrate: The sale of lottery-tickets is prohibited by the criminal law of New York. No one would contend that had the assured died in the State of New York from heart disease, while engaged in selling lottery-tickets, the case would have come within the proviso. It might have been within the strict letter, but not at all within the intention of the parties, for the reason that the violation of law, although criminal, had no possible connection with the death, and in no possible way increased the risk. Again, the criminal law of New York prohibits profane cursing and swearing. Suppose the death happened from some accident while the assured was violating the law, would this bring the case within the proviso? Clearly not, for the reasons above stated. (See also *ante*, § 246.) Again, suppose the death occurred from injury received while the assured was attempting to obtain by force the possession of a chattel of which another was in peaceable possession, the title to which was claimed by both, but which was really in the assured, the case would come within the proviso, for the reason that the risk was increased and the death caused by the violation of law by the assured, although such law was the civil law only, the deceased having committed no breach of the peace or any indictable offence. The Massachusetts court held in the same case, when again before it (99 Mass. 318), that the case would have come within the proviso had the assured at the time of being shot, in furtherance of his attempt to get the horses from Cox, been committing an assault and battery upon him. The court, I think, must have overlooked the fact that the violation of law in which the insured was engaged was eminently calculated to cause violence dangerous to his life to be inflicted upon him, and that the very object of the proviso was to exonerate the defendant from liability should death incur from this voluntary increase of risk. It follows that when the death occurs during the known violation of law by the assured, when such violation eminently tends to violence dangerous to life, the case comes within the proviso."

submitted to by her, with intent to cause an abortion, without any justifiable medical reasons, it was held on grounds of public policy that there could be no recovery.¹ The death must also happen while in the violation of law, though the language of the condition be "in consequence of." Thus, if a man be killed while in the act of adultery, the policy is void. If he be afterwards killed on account of the adultery as a provocation, the policy is not void.²

§ 330. **Death by Violence covered by Policy unless expressly excepted.**—A life policy covers death by violence in whatever form, as well as from natural causes, unless the particular form of violence is an expressly excepted clause.³

§ 331. **Violation of Law; Evidence.**—All the authorities agree that, unless it appear to the contrary, the criminal laws of all civilized countries will be presumed to be the same as those having jurisdiction of the case.⁴

§ 332. **Military Service; Death by Casualty or Consequence of War; Belligerent Forces; Permit.**—The force and effect of the not uncommon exemption from liability if the insured shall enter into the military service, and the scope of a permit to disregard the condition of the policy against residing beyond a certain degree of latitude, were considered in *Welts v. Connecticut Mutual Life Insurance Company*,⁵ where it was held that death from a roving band of banditti, thieves, and robbers, such as usually disturb communities during insurrectionary periods, is not one of the "casualties or consequences of war or rebellion," nor is it a death from "belligerent forces." And it was also held that under a permit to reside in a district known to be in a state of war, when hostile armies are contending for its possession, subject to

¹ *Hatch v. Mut. Life Ins. Co.*, 120 Mass. 550.

² *Goetzmann v. Conn., &c. Ins. Co.*, 5 T. & C. (N. Y.) 572. See also *post*, § 530.

³ *Spruill v. North Carolina Mut. Life Ins. Co.*, 1 Jones (North Carolina) Law, 126.

⁴ *Cluff v. Mut. Ben. Life Ins. Co.*, 13 Allen (Mass.), 308; *Arayo v. Currel*, 1 La. 528; *Savage v. O'Neil*, 42 Barb. (N. Y.) 374; *Holmes v. Broughton*, 10 Wend. (N. Y.) 75; *Bradley v. Mut. Ben. Life Ins. Co.*, 3 Lans. (N. Y.) 341; s. c. 45 N. Y. 422.

⁵ 46 Barb. (N. Y.) 412.

the stipulation that the insurers shall not be liable on account of a death happening from such casualties or forces, a condition in the policy against entering military service is so far modified that the insured may engage in the incidental service of bridge building, not in the vicinity of any hostile force, without prejudice to his right to recover under the policy.¹

¹ The facts in the case, and the conclusions of the court thereon, are thus stated by Smith, J.: "By this permit Welts was permitted to pass, by the usual route and means of public travel, to any part of the United States south of the thirty-sixth degree of north latitude, and reside there, or return, during the term of one year from the date of such permit, without prejudice to said policy; provided, and the said permit was issued with the understanding and agreement of the parties in interest, 'that the said Welts was not insured by said policy against death from any of the casualties or consequences of the war or rebellion, or from belligerent forces, in any place where he may be.' If this permit had not been given when all that part of the United States south of the thirty-sixth degree of north latitude was in a state of insurrection and war, and covered more or less with hostile armies, I should have considered that Welts came to his death from the causes covered by the proviso, and excepted from the policy. But he was permitted to go into any or all the insurrectionary States south of the line of the thirty-sixth degree of north latitude; the insurers well knowing, as well as the assured, of the existence of the war of the rebellion in all of these States. The assured paid an extra premium for such permit. He was killed where, under the permit, he had a right to be; he was not killed by rebels in any encounter of arms; he was engaged in no battle, or near any; he was twenty miles or more in the rear of the United States forces at Nashville, and it does not appear that there was any rebel force at the time north of the Cumberland; he was not exposed to any war peril, except such as existed through all the peaceful parts of Kentucky and Tennessee. Having the right to be in the place in which he was killed, the risk Welts then ran was one covered by the permit. He was engaged in no warlike enterprise. He was simply rebuilding railroad bridges far in the rear of, and away from any hostile forces. The band by which he was killed were, it seems, mere roving robbers, robbing Union men and rebels alike. They did not interfere with the work in which Welts was engaged. They did not destroy railroads or bridges, or make prisoners of any persons in Welts' company, or others. They merely robbed the members of the company of their money, making no demonstrations indicating that they were Confederate soldiers, or acting in the interest of the rebel government. It is true that Welts ran the peril of encountering such robbers by going into Tennessee; but this, I think, was part of the risk contemplated by the permit. The same peril would have been encountered if he had been travelling quietly in that section of country, simply passing from one place to another in any part of the United States south of the line of thirty-six degrees of north latitude. This permit is to be construed with reference to the known condition of the country at the time it was given, and the parties must both be deemed to have known what the ordinary perils were in the country where the insured proposed to go, and their contract must be interpreted in the light of this assumption."

This case was affirmed by the Commission of Appeals,¹ the court observing, amongst other things, "that the general understanding of the term includes such persons only as are liable to do duty in the field as combatants." But death in the military service of an enemy, whether excepted from the risk or not, or referred to, or even specially permitted, would doubtless be held to be not within the protection of a policy of insurance as against public policy.²

§ 333. **Military Service, What constitutes entering.** — In *Mitchell v. Mutual Life Insurance Company of New York*,³ it appeared that the insured went South after the breaking out of the rebellion, and served on the staff of several generals, though he received no commission. And the court thought that if the insured connected himself in any form with the belligerent force, whether he had a commission or not, he entered the military service, within the meaning of the policy. But a mere clerical position in the office of the Adjutant-General, subject to no military order or service, is not entirely such service within the meaning of the policy.⁴

§ 334. **Military Service, Voluntary or Involuntary.** — In *Dillard v. Manhattan Life Insurance Company*,⁵ the insured, threatened with conscription, entered the Confederate service, and occupied the position of brigade-post-quarter-master. It was claimed by the plaintiff that this was substantially an involuntary entering the service on the part of the insured, and if not, was for the benefit of the insurers, as the risk was less than it would have been to take the chances of compulsory service through conscription. But the court did not sustain these views.

§ 335. **Restrictions upon Residence; License to Travel.** — Where, by the terms of the policy, the residence of the insured is restricted within certain specified limits, and a license is given to remain without those limits till a cer-

¹ 48 N. Y. 34.

² *Ante*, § 37.

³ Decided in the Superior Court of Baltimore, and cited by Bliss, Ins. 643.

⁴ *New York Life Ins. Co. v. Hendren*, 24 Grat. (Va.) 536, 540.

⁵ 44 Ga. 119.

tain period, inability by reason of sickness and death to return within the time stated in the license was held not to work a forfeiture, as the assured was excused on account of his inability, which was the act of God.¹

It has since, however, been held that if such facts constitute an excuse in any case, they do not apply where the insured, already in feeble health, goes without the restricted limits, and remains there until he is too feeble to return. In such case the insured takes the risk, and cannot allege the impossibility of return as an excuse.²

§ 336. **Restrictions upon Residence and Travel.** — But where there was a condition that the insured should not remain more than five days within certain limits, on penalty of forfeiture, and the insured remained there ten days, when he was taken sick, and died within the prohibited limits, it was held that there could be no recovery under the policy,³ whether the violation of the condition was, or was not, in any way the cause of the death. In another case, where there was a permit to travel by one route, and the insured travelled by another, but the change had no materiality to the risk, the court were divided in opinion as to whether this would be a defence.⁴ The indorsement upon a policy, however, of a permit which purports to grant privileges for a consideration paid therefor, which are only such as may be enjoyed under the provisions of the policy, will not restrict the rights of the insured under the policy, — rights for which he had already contracted and paid. These rights may be availed of as if no permit had been indorsed;⁵ and if such

¹ *Baldwin v. New York Life Ins. Co.*, 3 Bosw. (N. Y. Superior Ct.) 530. Hoffman, J., also gave a separate opinion to the same effect, in which the cases illustrative of the doctrine that non-performance of an obligation may be excused when it becomes impossible by the act of God, are carefully collected and stated.

² *Evans v. United States Life Ins. Co.*, 64 N. Y. 304, affirming s. c. 3 Hun, 587, and apparently overruling the case of *Baldwin v. New York Life Ins. Co.*, *supra*. See *Wheeler v. Conn. Life Ins. Co.* (N. Y.) 10 Ins. L. J. 116, 120. See also *post*, § 352.

³ *Nightingale v. State Mut. Life Ins. Co.*, 5 R. I. 38.

⁴ *Bevin v. Conn. Mut. Life Ins. Co.*, 23 Conn. 244.

⁵ *Forbes v. American Mut. Life Ins. Co.*, 15 Gray (Mass.), 249.

an indorsement be made at the time the policy is issued, it is to be regarded as part of the policy, modifying any condition to which it relates.¹ But a permit to proceed to a particular place without the limits to which the insured is restricted by the terms of the policy, written on a receipt for the premium paid at the time of taking out the policy, is no part of the policy, but a separate and independent agreement. Such a permit authorizes the insured to go beyond the restricted limits, but not to reside there, except as allowed under the terms of the policy.² (a)

§ 337. **Restrictions upon Residence and Travel; Settled Limits.** — The “settled limits” of the United States means the established boundaries of the Union, and a death beyond the region of actual settlement is covered by the policy. The word “settled” in such a case, and in its connection with the word “limits,” is equivalent to “fixed” or “established.” In the sense of occupied or inhabited, it would give rise to great, if not insurmountable, difficulties of proof, and would be so vague and uncertain, that courts should not uphold such a view unless upon the clearest evidence that such was the intention of the parties.³ “The primary definition of the word ‘settled,’” said Selden, J., “is fixed, placed, established. It is true it is also, though more rarely, used as descriptive of a section of country that is ‘planted with inhabitants;’ but it is obvious that it can never, with propriety, be used in the latter sense in connection with the word ‘limits.’ Limit means boundary, border, the outer line of a thing, and nothing else, except when used to convey the idea of restraint. There may be

¹ *Rainsford v. Royal Ins. Co.*, 1 Jones & Spencer (N. Y. Superior Ct.), 453.

² *Ibid.*

³ *Casler v. Conn. Mut. Life Ins. Co.*, 22 N. Y. (S. Smith) 427. — *Constock, C. J.*, and two other judges dissenting, who held that the words were equivalent to the “region of settlement.”

(a) A permit to travel in regions where the policy prohibits residence is construed liberally, so as to give the privilege of going and making reasonable stops as passengers and travellers are accustomed to do. *Converse v. Knights Templars' Ind. Co.*, 93 Fed. Rep. 148, 151; *Benefit L. Ins. Co. v. Martin* (Ky.), 55 S. W. 694.

a settled region, a settled country, or a settled territory, but there can be no such thing as a settled limit, in the sense contended for." And it was held not to be susceptible of meaning "the region of settlement," as contended for by the insurers.

§ 338. **Restrictions upon Residence and Travel; License; Construction.** — A license or permit about which there is any ambiguity will be construed most strongly against the company. Thus a permit setting forth that the insured is about to proceed to, and reside at, Belize, and granting liberty to reside there for one year, may be availed of for any year thereafter during the currency of the policy.¹ So a permission to go by sea in a first-rate vessel is not restrictive of the mode of travel, whether by steerage or in the cabin.² But a permit, clear in its terms, must be strictly followed, or it will afford no protection. Thus a permit to make a voyage, out and home, to California, round Cape Horn or by the way of Vera Cruz, will not authorize making the voyage by the way of Panama, though this may be the safer route.³ A permit to engage in sea service "on the prior payment any year of an additional premium" does not authorize the continuance of the service beyond the year without the payment of an additional premium, and such continuance works a forfeiture of the policy.⁴ The condition remains in force in all its stringency, except so far as it may be modified by the terms of the permit.

§ 339. **Restrictions upon Residence and Travel; Waiver.** — But the right to insist upon a compliance with such restrictions may be waived; and a receipt of the premium by the insurers after a known violation of the condition against residence abroad, or of the terms of the permit granted, is a waiver of their right to claim a forfeiture by reason of such violation.⁵ And this is true whether the knowledge be actual

¹ Notman v. Anchor Ass. Co., 4 C. B. N. s. 476.

² Taylor v. Aetna Life Ins. Co., 13 Gray (Mass.), 434.

³ Hathaway v. Trenton Mut. Life Ins. Co., 11 Cush. (Mass.) 448.

⁴ Ayer v. N. E. Mut. Life Ins. Co., 109 Mass. 430.

⁵ Bevin v. Conn. Mut. Life Ins. Co., 23 Conn. 244.

or constructive, as where the violation is known to the agent of the insurers who received the premium;¹ unless where the policy contains a notice to the insured that the agent has no authority to waive the condition;² and even then, if the conduct of the insurers misleads the insured to his prejudice.³ [But where one whose life was insured went without permission of the company south of the line to which his policy ran at that season of the year, and died there, a relative, ignorant of the death, paid the price for a permit to go south to the company's agent, who forwarded it requesting a permit. Eleven days after, learning of the death, the company tendered back the money received from the relative, and it was held that there had been no waiver of the forfeiture.⁴]

¹ *Wing v. Harvey*, 5 De G., M. & G. 265 ; s. c. 27 Eng. L. & Eq. 140 ; *Garber v. Globe, &c. Ins. Co.*, C. Ct. (Mo.) 5 Big. Life & Acc. Ins. Cas. 221. And see also *Girdlestone v. N. B. Mar. Ins. Co.*, 11 L. R. (Eq.) 197.

² *Lorie v. Connecticut, &c. Ins. Co.*, C. Ct. (Mo.) 5 Big. Life & Acc. Ins. Cas. 233. See also *post*, § 511 *a*.

³ *Post*, § 356.

⁴ [*Bennecke v. Insurance Co.*, 105 U. S. 355, 361.]

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